United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

REPLY BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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For the
District of Columbia Circuit
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No. 13,833

FLORIDA ECONOMIC ADVISORY COUNCIL,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL POWER COMMISSION

No. 13,952

FLORIDA ECONOMIC ADVISORY COUNCIL,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF ORDER OF FEDERAL POWER COMMISSION
OR IN THE ALTERNATIVE
TO AMEND PETITION FOR REVIEW IN NO. 13,833

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Pursuant to leave of Court granted at the close of the oral argument on September 16, 1957, Petitioner files this single Reply Brief to the three Briefs filed respectively by Respondent, Intervenors Coastal Transmission Corporation and Houston Texas Gas and Oil

Corporation, and Intervenors Florida Public Utilities Commission and Florida Development Commission.

The many, varied and complex issues in this case have been fully briefed by the parties hereto. Petitioner believes that sound and sufficient answers to the arguments made in the briefs of Respondent and the Intervenors supporting it were made in the main brief of Petitioner and in the oral argument, three transcripts of which have been lodged with the Court by Petitioner. Therefore, Petitioner, to avoid unduly burdening the Court, will confine this Reply Brief to three basic points, which in its view are not only vital in this case, but of great importance in the daily administration of the Natural Gas Act by Respondent, and of serious significance in the implementation of the procedural and substantive policies of the Congress expressed in that Act.

THE CONDITIONAL GRANT OF CERTIFICATES

Respondents Errors on the Matter of Conditions.

Respondent and Intervenors[1] do not deny that whether or not the grant of certificates was, in the words of Section 7(e) of the Natural Gas Act, "required by the present or future public convenience and necessity" was an issue to be determined on the record after hearing, and that Petitioner was entitled to be fully heard on that issue. Rather, they argue that a full hearing was had. Thus, Respondent says at p. 46 of its Brief that the "procedures that were followed afforded petitioner full opportunity to introduce evidence, brief, and orally argue every issue decided by the Commission." [Emphasis supplied.]

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1 For convenience we will use the term "Intervenors" to refer to Coastal Transmission Corp. and Houston Texas Gas and Oil Corp. We will use the term "Florida Commissions" to refer to the other Intervenors.

This argument is wholly untenable. In Opinion and Order 301, issued December 28, 1956, Respondent found that "certain unfavorable features" of Intervenors' projects "relating to applicants' rate proposals and contracts, and particularly to the gas transportation arrangement, have not been shown to be required by the public convenience and necessity and cannot be accepted on their present terms." (J. A. 431-2). For example, Respondent found that the arrangement for transportation for the power companies "was subject to such basic defects ... that it cannot be approved as it stands"; that the rates for transportation were "substantially below the cost of rendering the transportation service"; and that "other classes of service would be required by reason of the [transportation] arrangement to assume a proportion of the cost of operations in excess of their fair share." (J. A. 444, 445) Furthermore, and of vital significance, Respondent found that "although the evidence is not sufficient to enable a determination of precisely what the proper rate should be, it sufficiently supports the conclusion that Houston Gas presently proposed rates are not designed to require each class of service to bear its proper share of costs." (J. A. 447)

In short, Respondent found that on the Record made it could not certificate Intervenors' projects. In these circumstances Section 7(e) of the Natural Gas Act in terms required Respondent to deny Intervenors' applications. Such denial would of course be without prejudice to the filing of new applications. However, Petitioner does not stand solely on this. It assumes arguendo that Respondent, despite the plain language of Section 7(e), was not required to finally deny the applications. The question then is: What other action could it have taken? We submit that the only other action permissible was to order the Record re-opened and further hearings held for the purpose of permitting Intervenors to introduce evidence to show that they could in fact "overcome the deficiencies" of their projects and "bring [them] into conformity with the Act's standards."

This Respondent did not do. Rather, it granted the certificates subject to future compliance by Intervenors with various conditions. Respondent sought to justify this action in the following terms. After discussing the various defects of the applications it said: (J. A. 443)

> "In view of these facts, we conclude that it is in the public interest to conserve and utilize those features of applicants' projects which have been shown to meet the Act's requirements, imposing the conditions which the public convenience and necessity require to bring the projects into conformity with the Act's standards. Thus, although the conditions which we shall impose are substantial, the only alternative is to deny the applications. The course we shall pursue leaves open the possibility that applicants can overcome the deficiencies which we shall point out and thereby attain the objective of paramount concern to all in this case -- natural-gas service at reasonable rates to Florida consumers, under circumstances which protect all substantial interests relating thereto." [Emphasis supplied.]

The vice in the course pursued is pointedly illustrated by an examination of just two of the conditions imposed. Respondent ordered Houston to file within 30 days tariffs for "firm sales for resale, interruptible sales, and for transportation ... commensurate with the cost of service determined on a reasonable allocation of costs between these services in accordance with usual Commission standards and based on a rate of return of not in excess of 6%." (J. A. 462) Similarly, Respondent ordered Coastal to file within 30 days a tariff "for charges by Coastal for services to Houston Gas based on a cost-of-service formula," with "separate charges (a) for gas sold by Coastal to Houston Gas and (b) for gas transportation service rendered to Houston Gas with respect to gas transported to Florida Power & Light and Florida Power. Such separate charges shall be based on a reasonable allocation of costs between the two services in accordance with the usual Commission standards."

It is clear from what we have seen that Intervenors' compliance with these and the other conditions imposed by Respondent was a sine qua non for certification of the projects. It follows that among the issues that had to be resolved before certificates could be granted were the issues whether Intervenors had in fact complied with the conditions. It is equally clear, as we shall show, that compliance vel non was not something capable of determination by the mere examination of filed tariffs. Therefore, under the express provisions of Section 7 of the Natural Gas Act these issues could only be resolved from evidence adduced on the record at a hearing. There was no such evidence here. Nevertheless, Respondent did not re-open the Record and held no further hearings. Instead, on February 21, 1957 it simply issued an order relieving Intervenors of compliance with some conditions and finding compliance with others.

To illustrate, the Order of February 21 recites that Intervenors had filed new tariffs together with "various supporting materials" (J. A. 556) and "cost of service data." (J. A. 560) It then orders the tariffs "accepted for filing as in conformity" with the rate conditions imposed in Opinion and Order 301 (J. A. 572, 573). The filings so accepted by Respondent were made ex parte and dehors the Record. Petitioner was given no opportunity even to comment on them, and its Petition for Re-hearing of the Order of February 21, 1957 was not even allowed to be filed (J. A. 598). As Petitioner protested in that Petition for Re-hearing: (J. A. 585)

> "The Houston and Coastal filings in purported compliance with Paragraphs (B), (B)(1), and (C) of Opinion and Order No. 301 were not served on the parties and are not part of the record upon which the Commission could act. Those paragraphs required Applicants to establish rate schedules based on a reasonable allocation of costs in accord with usual Commission standards. In the Order of February 21, 1957, the parties are summarily told by the Commission that such cost of service data has been submitted. However the person or persons who prepared the data have not been presented

> for cross-examination and no opportunity has been given or even offered to probe the reasonableness of their allocations. Despite the lack of these fundamental requirements for a fair hearing, the Commission, with some trepidation, accepts the filings. By so doing, it is submitted, the Commission acted without substantial evidence in the record to support its decision and failed to provide a fair hearing as required by law."

Basically, Respondent seeks to defend its actions in this respect in two ways. It says in its Order of February 21 that "under the statute, the only hearing required to support the imposition of a condition ... is the specific and only hearing for which the pertinent section [Section 7 of the Natural Gas Act] makes provision --- the hearing on the certificate application. (J. A. 565) This entirely misses the point. Petitioner does not complain that Respondent imposed conditions which it expressly found to be required to make the projects eligible for certification under the standards of the Natural Gas Act. It complains that Respondent issued certificates before it determined either what was necessary to meet the conditions or whether Intervenors could or would do what was necessary to meet them.

This, Petitioner submits, was fatal error for two reasons. First, Respondent granted certificates without substantial evidence to support its ultimate finding that certification was required by the public convenience and necessity. This is a plain violation of Section 7(e) of the Natural Gas Act. Second, it deprived Petitioner of a full and fair hearing on the issue of certification vel non. This is a plain violation of Petitioner's rights expressly conferred by Sections 7(c) and 15(a) of the Natural Gas Act and Section 7 of the Administrative Procedure Act.

Respondent's narrow and formalistic view of the matter would, if allowed to govern, make the appliable Congressional commands empty phrases. The results flowing from that view are seen in the almost ludicrous Order of April 18, 1957, (J. A. 598) affirming Respondent's Secretary's rejection for filing of Petitioner's Petition for Rehearing

of the Order of February 21. Respondent first points out that the Order of February 21," among other things, denied applications for rehearing" of Opinion and Order 301, and recites some of those "other things." Then, completely ignoring the fact that it was those "other things" that Petitioner's Petition for Rehearing challenged, Respondent, in a perfect non sequitur, concludes that the "order of February 21, 1957 was on applications for rehearing" and that Petitioner's filing was properly rejected as a consecutive application for rehearing.

In this Court Respondent in effect abandons the position just discussed. It argues that its findings in its Order of February 21 that Intervenors' ex parte filings dehors the Record fully complied with the conditions imposed in Opinion and Order 301 were proper because once the conditions were imposed there was no issue in the case left for resolution. It says that the conditions "did not raise new issues but resolved the issues previously raised and tried. . . . A second hearing would merely be an opportunity for retrial of the same issues originally tried, with the benefit of a pre-view of the decision." (Res. Br. p. 42). On oral argument, in response to questions from the Court, Respondent made its argument more specific. Speaking of the rate conditions, Respondent's counsel said that the only issue was whether Intervenors' rates were to be designed to require each class of service to bear its fair share of the cost of service. "Having resolved that, what its share was was not in issue." (Tr. Oral Argu. 29). When asked whether the reasonableness of the allocations made by Intervenors to meet the rate conditions was an issue Respondent's counsel replied that that "is not the controverted issue that the Commission has decided." (Tr. Oral Argu. p. 30).

Respondent is right in this matter in one respect, namely, that the imposition of the conditions did not raise any new issues. In all other respects it is patently wrong. Throughout the proceedings, as Opinion and Order 301 makes clear, there were in issue both the question (1) whether Intervenors' rates should be commensurate with the cost of service and, (2) if so, what rates would be commensurate with

the cost of service. As Respondent says, it resolved the first of these issues in Opinion and Order 301 by finding that it could not grant certificates unless Intervenors filed rates that were commensurate with the cost of service. However, it expressly found in that Opinion that the evidence was not sufficient to enable it to resolve the second issue, i.e., to determine what rates would be commensurate with the cost of service. (J. A. 447, supra p. 3). It is worth noting in passing that Respondent made this latter finding despite the facts that Petitioner introduced evidence to show what rates would be commensurate with the cost of service (J. A. 99 et seq., 375-386), and Intervenor Houston introduced evidence to show that, using the so-called "Houston method" of cost allocation, the rates it proposed were commensurate with the cost of service (R. 14435-46). Be that as it may, Respondent, on the basis of these findings, conditioned the certificates it granted by ordering, inter alia, that Intervenors file new rates "commensurate with the cost of service determined on a reasonable allocation of costs between these services." (J. A. 462, supra p. 4).

From the foregoing it is perfectly clear that (1) Opinion and Order 301 did not resolve all of the issues in the case, but on the contrary, left for future resolution the issue whether whatever rates Intervenors might subsequently file were commensurate with the cost of service reasonably allocated, and (2) in Respondent's view, the resolution of that issue by a finding that they were was a sine qua non for certification. It is also perfectly clear that the Order of February 21 did, albeit improperly, resolve that issue. It found that Intervenors' newly filed tariffs were "in conformity to paragraphs (B) and (B)(1) [and (C)] of the Commission's order issued December 28, 1956," i.e., that they were commensurate with the cost of service reasonably allocated. Indeed, it is the impropriety of this resolution of this issue that Petitioner complains of.

The issue whether particular rates are commensurate with the cost of service reasonably allocated is one that obviously can be resolved only after hearing. As Respondent said in Atlantic Seaboard Corp., et al., 11 F.P.C. 43, 53, 54, the "proper allocation of costs is ... one of the most controversial of issues." In "the final analysis the allocations of cost ... are and must be largely dictated by informed judgment." Again, in the same opinion Respondent said, quoting the Supreme Court in Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 589: "Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science."

The soundness of these statements is evidenced in this very case. Commissioners Connole and Kline, in their dissent in Opinion 301, using "the Applicant's figures allocated generally in accordance with the Atlantic Seaboard case" thought the cost of transportation would be 18.6¢ per MCF. (J.A. 471) Witness van Scoyoc, testifying for Petitioner and using the various hypotheses respecting operations, rates of return and capitalization in the Record, found transportation costs ranging from 12.88¢ to 15.83¢ per MCF for Florida Power Company and from 18.78¢ to 22.67¢ for Florida Power & Light Company (J.A. 99 et seq., 375-386). Witness Herzig for Houston, using two different methods of allocation, found transportation costs for the power companies in the first year to be either 12.3 or 17.7, in the second year either 13.1 or 17.5, and in the third year either 12.8 or 16.1 (R. 14436, 14438). Respondent, on the other hand, simply said that it could not determine from the Record what the costs of service reasonably allocated were (Supra, p. 3). Nevertheless, in its order of February 21, 1957 it accepted, on the basis of ex parte filings dehors the record, firm resale rates of 55¢, preferred interruptible rates of 33¢, primary interruptible rates of 30.1¢ and transportation rates of 17.5¢ for Florida Power & Light and 13.5¢ for Florida Power -- all as rates "commensurate with the cost of service determined on a reasonable allocation of costs."

The cases Respondent and Intervenors rely on to support Respondent's action are clearly inapposite. In all of them there was evidence adduced on the record made at the hearing that was held to support the findings of the Commission. To speak in the tenor of Respondent's argument, in all of those cases, unlike the case here, the Commission could properly, and did, resolve every issue from the evidence in the record. Thus in Signal Oil and Gas Co. v. Federal Power Commission, 238 F. 2d 771, 775 (C. A. 3rd, 1956) Respondent conditioned Signal's certificate to require the filing of a rate of 10¢ per MCF for gas sold pursuant to the certificate. Signal challenged the legality of the condition. The Court said that the "question of the rate to be fixed was gone into at length in the proceedings before the Commission." It then reviewed the evidence and held that "substantial evidence supports the Commission's finding that public convenience and necessity required the certificate to be conditioned on a 10¢ rate." The point in the case at bar, i. e., the necessity of further hearings to determine whether there was in fact compliance with the condition, was not raised there and was not in the case, because obviously, it would not be necessary to hold a hearing to determine whether Signal in fact filed a 10¢ rate.

In Interstate Power Co. v. Federal Power Commission, 236 F. 2d 372, 383 (C. A. 8th, 1956) the parties to the proceedings before Respondent introduced elaborate evidence on the issue of the proper rate zones to be fixed. The trial examiner recommended particular zones. On exceptions to his intermediate decision Respondent rejected his zones, as well as the various zones proposed by the parties and fixed different zones. On judicial review it was contended that Respondent could not do this without re-opening the record for further hearings. The Court held that further hearings were unnecessary because "the evidence ... taken in sixteen days of hearing and including some 2,000 pages of testimony and 46 exhibits, many of which are quite voluminous, was sufficient to enable the Commission to establish just and proper zone lines." In short, contrary to the case here, Respondent there resolved the zoning issue only on the

record after hearing, and there was substantial evidence to support the particular resolution it made.

The case on which Respondent and Intervenors principally rely, C. A. B. v. State Airlines, 338 U. S. 572, is equally inapposite. There State, an applicant for a certificate, contended that it had been deprived of a fair hearing because a competing applicant for a certificate had been awarded one over a somewhat different route than that for which it had applied. The Supreme Court held that State had in fact had an opportunity to contest the fitness of its competitor to operate over the route awarded it and that the Board's conclusion that the competitor was not only fit but more fit than State "was supported by substantial evidence." 338 U.S. at p. 582. In contrast, in this case Petitioner was given no opportunity to challenge or test Intervenors' claim of compliance with Respondent's rate requirements for certification and Respondent itself held that the evidence of record was not sufficient to enable it to determine what rates met its requirements.

Petitioner's Rights on the Matter of Conditions.

Respondent and Intervenors both say that Petitioner had no standing before Respondent to challenge, or be heard on, the issue of compliance with the rate conditions in Opinion and Order 301. Respondent argues that this was not a rate case and that "the Commission is not required to formulate rate-case conclusions as an incident to the determination of public convenience and necessity." (Br. 17) In oral argument, in response to questions from the Bench, Respondent's counsel stated that Petitioner could test compliance with the rate conditions by filing a complaint with Respondent "and on that complaint there can be a regular rate case under Section 5(a)." (Tr. Oral Argu. 35).

Intervenors take a different view. They say that Respondent need not even find that their rates are satisfactory (Br. 14). They further say that Petitioner simply has no statutory right to a hearing on compliance with conditions because the Congress did not intend that hearings be held on such matters (Br. 27, 28). On oral argument their counsel took the

position that Respondent has competence to pass on whether there has been compliance, and that the "acts of the parties in compliance with a condition ... are not acts by which the public convenience and necessity is tested. That has been found. The Commission has already found the public convenience and necessity. So that all we have here is the question of technical compliance with a technical rule of the Commission." (Tr. Oral Argu. 46).

The argument that this is not a rate case and that Respondent therefore need not "formulate rate-case conclusions" and need not find that rates are satisfactory is altogether beside the point. The fact is that Respondent, as we have seen, did "formulate rate-case conclusions," did find that Intervenors' rates were unsatisfactory, did find that the public convenience and necessity would not permit the issuance of certificates unless they were satisfactory, did condition the certificates to require satisfactory rates to be filed, and did find the rates in purported compliance with the conditions to be satisfactory.

In short, the fixing of proper rates was treated as an indispensable pre-requisite to certification on the facts of this case. Indeed it could not properly have been treated otherwise. This case, as Respondent said in Opinion and Order 301, is sui generis because the "key to applicants' proposals, ... the backbone of their proposed projects" (J. A. 443) is the arrangement under which two power companies would have transported for them 150,000 MCF of gas per day -- 60% of the total delivery capacity of the lines -- for a period of 20 years. Without that market the projects patently could not be certificated. But whether that market existed depended altogether on whether the transportation rates to the power companies, coupled with their cost of gas in the field, resulted in a total delivered price to them less than the price of oil. Their witnesses frankly testified to this effect (J. A. 92-92b-95). In these circumstances, Respondent obviously could not leave for a future rate proceeding the determination of what transportation rates were commensurate with the cost of service reasonably allocated. It had to make that determination

before certification, because until it was made it could not be known whether the power companies would contract for gas deliveries. Thus this case is clearly distinguishable from the ordinary case, such as Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 169 F. 2d 881, in which Chief Judge Edgerton said that Respondent need not fix rates before certification. In the ordinary case, in contrast to this one, the great bulk of gas to be delivered is to be sold to distributing companies for re-sale. The prospective buyers are willing to contract to buy at whatever rates Respondent might from time to time fix in the exercise of its rate-making function under Sections 4 and 5 of the Natural Gas Act. They do not, as did the power companies on this Record in this case, make the rate to be charged them the primary, indeed the sole, factor in their decision to contract or not. It was because of this uncertainty that Commissioners Connole and Kline voted to deny certification and Respondent issued conditional grants of certificates.

The argument of Intervenors that Petitioner has no right to be heard on compliance with conditions is shortly answered. Petitioner has a statutory right to be heard on every issue that Respondent finds it necessary to resolve in order to determine whether the public convenience and necessity requires certification. Whether the rates Intervenors filed were commensurate with the cost of service reasonably allocated was such an issue in this case and was resolved by Respondent by the Order issued February 21, 1957. That Order was entered without evidence in the Record to support it and without hearing. It is therefore illegal. Intervenors' contention that compliance with Respondent's conditions requiring the filing of rates commensurate with the cost of service reasonably allocated was a matter of "technical compliance with a technical rule" is absurd.

There are two answers to Respondent's contention that Petitioner can challenge the rates filed and accepted by Respondent by bringing a complaint under Section 5 of the Natural Gas Act. First, it is extremely doubtful that Petitioner, as an association of competitors of Intervenors,

has any statutory right to invoke Respondent's rate-making jurisdiction under Section 5 of the Natural Gas Act, or even to intervene in rate proceedings whether under that Section or under Section 4(d) of that Act. Intervenors, differing with Respondent, flatly say that Petitioner is precluded from inquiring into rate and tariff matters, (Br. 49) citing Alston Coal Co. v. Federal Power Commission, 137 F. 2d 740. The Court of Appeals for the Tenth Circuit there held that a coal company did not have a right as a competitor to intervene in a Section 5 rate proceeding. Petitioner will not here foreclose itself from challenging that holding, but admits that it is probably right.

But be that as it may, as we have demonstrated, Respondent held that the filing of proper rates was a sine qua non for certification. Petitioner is therefore entitled as a party to the certificate proceedings to be heard on the issue whether the rates accepted as proper were in fact proper in those certificate proceedings. It has this right whether or not it has a right to be heard on Intervenors' rates in some rate proceeding at some future time after certification and operation of the projects and the damage to Petitioner therefrom are accomplished facts.

THE OMISSION OF THE INTERMEDIATE DECISION PROCEDURE

The error of Respondent in omitting entirely the intermediate decision procedure required by Section 8(a) of the Administrative Procedure Act is fully shown in Petitioner's Main Brief at pp. 17-23.

Respondent in its Brief builds an elaborate argument in an effort to show that Petitioner is contending that a finding that Respondent's "certificating function imperatively and unavoidably . . . requires" the omission of the intermediate decision procedure is not sufficient reason for omitting it (Br. 38-40). Petitioner contends no such thing.

On the contrary, Petitioner agrees with Respondent that the "words 'imperatively and unavoidably' characterize the degree, the stringency of the need for the omission in order that there may be 'due and timely execution' of agency functions." Petitioner agrees that "the legislative history of this clause of the Procedure Act [is] no more than a recognition that sometimes an agency simply will not be able to function if it has to follow the intermediate decision procedure." Petitioner differs with Respondent only when it says that this was a case in which it "will not be able to execute" its function without omission of the intermediate decision procedure.

Respondent based its order on a finding that "the gas purchase contracts of Coastal will be subject to cancellation" unless a certificate were granted to Coastal by December 31, 1956. This finding is insufficient on its face to support the necessary ultimate finding that Respondent, to use its own terms, "will not be able to execute a function if it has to follow the intermediate decision procedure."

There is nothing in the record from which it can even be inferred that Coastal's suppliers would exercise their options to cancel their contracts. The only inference that can be drawn is to the contrary for as we point out in our Main Brief, p. 21, there had been extensions of deadlines granted by Coastal's suppliers without new or additional consideration from Coastal as late as July, 1956. These extensions, as well as new contracts entered into as late as October 15, 1956, fixed deadlines of December 31, 1956.

Although, as Respondent says, (Br. 35) "neither applicants nor the Commission can know how long a certificate case will take", they certainly know that the minimum time after the trial examiner's decision is served is something in excess of the 20 days the parties have to take exceptions. (Sec. 1.31(a) of Rules of Practice and Procedure). In this case Intervenors had not even completed their direct case by October 15, 1956, and the hearings did not close until November 28, 1956. One

might indeed well ask, as was asked at oral argument: Was the parties' action reasonable in the circumstances? (Tr. Oral Argu. 40). Or was their action the very action Respondent said it would not allow but did allow here, namely, the fixing of date deadlines within which Respondent must act "as a grounds or basis for waiver of the intermediate decision procedure." (J. A. 412).

Respondent itself recognized in Opinion 301 that this was not a case in which it "will not be able to execute a function if it has to follow the intermediate decision procedure." It there (J. A. 426) said:

> "In support of their motions for the omission of the intermediate decision procedure, applicants set forth that all of Coastal's contracts for the purchase of gas for resale, covering some 824 billion cubic feet of gas reserves, are subject to cancellation by the producers if Coastal has not received a certificate of public convenience and necessity from the Commission by December 31, 1956. Of course, this fact is immaterial to determining the merits of this case. However, we consider that irrespective of the decision reached, we should decide the merits of applicants' proposals rather than permit any delay in doing so to result in the possible cancellation of these supply contracts and the possible failure of the projects on that account. So although we do not approve and will not countenance attempts by any party to hasten decision by fixing or asserting deadlines, in this case it is in the public interest that our decision be issued before the end of the year." [Emphasis supplied.]

The possibility of cancellation of contracts, and if that happened the consequent possibility that the projects might fail, do not support the finding required to be made on the whole record before the intermediate decision procedure can be omitted, i. e., that the "due and timely execution of [Respondent's] functions imperatively and unavoidably so requires." [Emphasis supplied.]

THE ISSUES OF UNFAIR COMPETITION TO PETITIONER

In attempting to meet Petitioner's point of unfair competition, Respondent and Intervenors' Briefs, as they do with so many points, ignore the facts and fail to argue the issues.

They both argue vigorously (Res. Br. 30-33; Int. Br. 34-40) that Opinion and Order 301 considered, made findings upon and rejected Petitioner's contentions. But the only findings they can point to are those to the effect that Intervenors' projects would give Florida a second source of fuel, would give rise to greater competition and would aid in the economic development of the State, and that "it reasonably appears that increased industrial and other activity from the introduction of natural gas will yield offsetting benefits in the long run." This, Respondent said, outweighed the interests of competitors and the economic losses they would initially suffer (J. A. 459-60).

But these findings are not relevant to the issue Petitioner raised, which was that the arrangement among the Intervenors, the power companies and the latters' suppliers, designed, as it admittedly was, without regard to the costs and to assure the power companies that the delivered price of gas would always be below the price of oil (J. A. 92, 92b-95), violated both the letter and the policy of the antitrust laws. Familiar doctrine, recently strongly reiterated by this Court in Pittsburgh v. Federal Power Commission, 237 F. 2d 741, requires Respondent to consider and make findings on this issue. That Respondent did not do. Its finding that economic losses to Petitioner would be offset by economic gains to industry in Florida does not touch the question whether those economic losses or those economic gains will result from an arrangement, concededly the "backbone" of Intervenors' projects, that violates the antitrust laws and the public policy of the United States expressed therein. Economic gains to industry in Florida flowing from such violations obviously cannot be found in the public interest. Nor can the introduction of natural gas into Florida to provide competition with oil

be found in the public interest when the competition so engendered is unfair.

Respondent was bound to make findings on Petitioner's contentions in this matter since issue was joined on them. Intervenors argue (Br. 39) that specific findings are not necessary. They apparently think that the general finding that "such arguments, contentions and objections advanced by any party to this proceeding as have not been specifically disposed of herein have been considered but are without substantial support in the record or reasonable basis in law" (J. A. 461) is enough. It is not. The Pittsburgh case plainly holds that anti-trust issues are highly material in the exercise of Respondent's functions under Section 7 of the Natural Gas Act. Consequently, the holding of this Court in Radio Station KFH v. Federal Communications Commission, No. 13272, decided June 27, 1957, governs here. There, as here, there were no specific findings on issues raised in the administrative proceedings. There, as here, it was argued that they were unnecessary in view of a general finding such as that quoted above. Speaking for the Court, Chief Judge Edgerton there pointed out that Section 8(b) of the Administrative Procedure Act requires the record to show the ruling on each "finding, conclusion or exception presented." Distinguishing cases in which the parties are "unmistakably informed" of the basis of an agency's action, he held that the findings in that case were insufficient. Nothing could be more apt here than his language in ordering a remand there:

> "Though a specific ruling on each minor exception is not indispensable, the parties and the court should not be left to guess, with respect to any material issue, or to any group of minor matters that may have cumulative significance which of several alternatives the Commission had in mind. It should make the basis of its action reasonably clear. We cannot find that it did so here. Its statement of reasons comes to little more than this: For one reason or another, all the exceptions not granted are overruled. This court must therefore remand the case to the Commission." [Emphasis supplied]

CONCLUSION

For the reasons set forth in Petitioner's Main Brief, this Reply Brief and on oral argument the orders of Respondent under review must be reversed.

Respectfully submitted,

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BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED AUG 5 1957

Joseph W. Stewart
CLERK

No. 13,833

FLORIDA ECONOMIC ADVISORY COUNCIL,

Petitioner

v.

FEDERAL POWER COMMISSION,

Respondent

COASTAL TRANSMISSION CORPORATION,
HOUSTON TEXAS GAS AND OIL CORPORATION,
FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION
AND FLORIDA DEVELOPMENT COMMISSION,

Intervenors

No. 13,952

FLORIDA ECONOMIC ADVISORY COUNCIL,

Petitioner

v.

FEDERAL POWER COMMISSION,

Respondent

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL POWER COMMISSION

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PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

1. Whether the fact that Applicants' contracts had clauses giving suppliers and customers the right to cancel if certificates were not granted by December 31, 1956 constituted an emergency authorizing the Commission to omit the intermediate decision procedure when there was no evidence that any customer or supplier would cancel and the only evidence in the record showed that some contracts had already been extended.

2. Whether there was due consideration of the case in view of the shortness of time in which the parties could file briefs and in which members of the Commission could read the lengthy record, and particularly in view of the omission of the intermediate decision procedure.

3. Whether it was lawful for the Commission (a) to grant the certificates subject to major conditions to be performed without a record proceeding; (b) then, upon petition of one of Applicants, to eliminate some and modify other conditions while denying Petitioner and other intervening objectors an opportunity to make a submission or to be heard in opposition thereto; and finally, (c) to deny Petitioner the right to petition for rehearing of the modifying order.

4. Whether in view of the foregoing, Petitioner was denied a fair hearing in violation of law.

5. Whether, having found that the record was inadequate, that financing plans were indefinite and that the proposals were shot through with vitiating infirmities that would, but for the conditions imposed, require denial of the applications, the Commission's grant of the certificates was lawful and proper, particularly since some of the conditions were later eliminated or modified.

6. Whether the grant of the certificates was lawful in view of the Commission's failure (a) to pass upon the lawfulness of the rates charged Coastal Transmission Corporation by its suppliers, since, if such rates were unlawful, the economic feasibility of the project might be destroyed, and (b) to determine whether certain power company customers and their

direct suppliers, applicant performing merely a transportation service, came within the Commission's jurisdiction by reason of an option to Houston Texas Gas and Oil Corporation to pay for and sell to its resale customers some of the power company gas.

7. Whether the grant of the certificates was lawful in view of the Commission's failure to make any finding or, so far as the record shows, even to consider, Petitioner's claim, supported by the record, that agreements with Applicants' power company customers constituted unfair trade practices, in violation of the antitrust laws, that threatened Petitioner's members with economic injury and even destruction.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

Florida Economic Advisory Council Petitioner v. Federal Power Commission Respondent Coastal Transmission Corporation Houston Texas Gas and Oil Corporation Florida Railroad and Public Utilities Commission and Florida Development Commission Intervenors	)	No. 13,833
Florida Economic Advisory Council Petitioner v. Federal Power Commission Respondent	)	No. 13,952

ON PETITION FOR REVIEW OF ORDERS OF THE

FEDERAL POWER COMMISSION

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), to review and vacate orders of Respondent issued December 6, 1956, December 28, 1956 (Opinion No. 301), February 21, 1957, and April 18, 1957, in Dockets G-9262 and G-9960, proceedings under Section 7 of the Natural Gas Act.

The order of December 6, 1956 terminated the jurisdiction of the Presiding Examiner, ordered the omission of any intermediate decision

and directed the parties to file briefs in time too short to permit adequate presentation of the case.

The Order of December 28, 1956, (Opinion No. 301) granted the applications for certificates of convenience and necessity subject to a number of vital conditions. On January 28, 1957, Petitioner filed a petition for rehearing of this order.

The Order of February 21, 1957, on petition of one of Applicants, eliminated some and modified other conditions laid down by Opinion No. 301. Petitioner, on February 1, 1957, had filed an answer to the petition for modification of conditions. Respondent's Secretary, on February 6, 1957, rejected and returned this answer. On February 12, 1957, Petitioner appealed to Respondent from this action of the secretary. The February 21 Order denied Petitioner's appeal.

The Order of April 18, 1957, denied Petitioner's appeal of April 4, 1957, from the action of Respondent's Secretary on March 29, 1957, rejecting and returning Petitioner's petition of March 25, 1957, for rehearing of Respondent's order of February 21, 1957.

Petitioner's petition for review by this Court of the orders prior to that of April 18, 1957, was filed April 22, 1957, Docket No. 13,833. Its petition for review of the order of April 18, 1957 was filed June 17, 1957, Docket No. 13,952. The petitions were consolidated by order of this Court, dated July 5, 1957.

CONCISE STATEMENT OF THE CASE

On August 26, 1955, Houston Texas Gas and Oil Corporation and on February 8, 1956 Coastal Transmission Corporation filed applications under Section 7(c) of the Natural Gas Act for certificates of public convenience and necessity to construct and operate natural gas pipelines. By Respondent's order of June 21, 1956, the applications were consolidated. Hearings began July 9, 1956, and were concluded November 28, 1956. During the hearings Applicants amended their applications to seek permission for facilities to transport a daily average of 250,000 Mcf of gas instead of 350,000 Mcf as originally proposed. (R. 334-346, 354-368).[1]

[1] Unless otherwise indicated, references are to record pages in the Certified Transcript of the Record in No. 13,833.

Coastal proposed to construct and operate a natural gas pipe line and lateral supply line system, with compressor stations, approximately 574 miles in length, extending from Hidalgo County, Texas to East Baton Rouge Parish, Louisiana. The estimated cost was $54,589,000. Houston's project was a pipe line extending about 942.6 miles from Coastal's terminus in Louisiana to Miami, Florida. This, together with approximately 682 miles of lateral lines and compressor stations, was estimated to cost $94,285,000.

Under the amended proposals Coastal would be Houston's sole source of supply and Houston would be Coastal's sole market. (R. 9784-9789). For the first three years Coastal would transport and deliver to Houston an average of 248,642 Mcf of gas per day with a daily maximum of 273,506 Mcf. Some 100,000 Mcf per day would be purchased by Coastal from producers and delivered to Houston for transportation and resale to Florida markets. But some 150,000 Mcf on a daily average would be merely transportation gas for two Florida power companies. Florida Power and Light Company ("Florida Power and Light") would purchase a daily average of 100,000 Mcf of gas directly from producers which would be transported by Houston and Coastal. Florida Power Corporation ("Florida Power") would directly purchase about 50,000 Mcf of gas daily and this would be transported by Houston and Coastal (R. 20413-20414, 20420).

The power companies' contracts with their producers provide for "escalation" upward or downward with the price of Bunker "C" fuel oil, the gas price to vary 1 cent per Mcf for every shift of 6.6 cents per barrel in the price of Bunker "C" (R. 20417).

There was no contract between Coastal and the power companies. However, under the contracts between Houston and the power companies, the transportation service would be firm service that was not to be interruptible save for an exception in the case of Florida Power, under which Houston could use a portion of the peak day pipe line capacity assigned to Florida Power if such capacity should be required for firm resale service. In that case, Houston would sell Florida Power's gas and either deliver

make-up gas to Florida Power at a later date or, if the capacity were needed for firm resale service, Houston could pay Florida for its gas taken by Houston for resale. And Houston would be the sole one to decide whether to do the one or the other (R. 14507-14520).

The transportation rates to be charged the power companies were 15.5 cents per Mcf to Florida Power and Light, and 13 cents to Florida Power for the first two years and 11 cents thereafter. Compared with these, the rate for the inferior preferred interruptible service would be 33 cents per Mcf which, minus the average cost of gas of 16.53 cents, would leave 16.47 cents as the rate for transportation. The latter would be higher than the highest rate for the superior firm transportation service. The rate for the even less desirable primary interruptible service would be 30.1 cents per Mcf, a higher rate than the firm transportation rate to Florida Power. Finally, the general service rate would be 55 cents per Mcf (R. 14030, 14034, 14091, 14122).

The proposed pipe lines would be operating at capacity at their very inception (R. 4499).

Petitioner, an association of 119 fuel oil dealers, truck lines, marine transportation companies, terminal operators, and allied businesses (R. 5040-5046, 5120) intervened. Its uncontradicted evidence showed that, while, in relation to Florida's overall fuel needs, the amount of gas to be brought to Florida by Applicants' projects would be meager (R. 7827), nevertheless the detriment to Florida fuel oil dealers in general and Petitioner's fuel oil dealer members in particular would be serious and in some cases, disastrous. The latter's loss in fuel oil revenues would be 49.7% (R. 7842-7844). Petitioner's evidence further showed that as a result of bringing in a relatively small quantity of gas for a few users, the overwhelmingly proponderant fuel oil users of Florida would have to pay substantially higher prices (R. 7824 - 7827).

On November 14, 1956, Houston and Coastal moved orally for omission of all intermediate decision and, in lieu thereof, for final decision by Respondent (R. 6593-6599). Petitioner and others objected (R-6604-6607, 6665-6670). In response to this motion the Presiding Examiner

certified the Record to Respondent on November 16, 1956. The record at this time was incomplete (R. 20330). On December 6, 1956, Respondent issued its order omitting all intermediate procedure. The stated ground for this action was that Coastal, which had filed its application with Respondent February 8, 1956, had clauses in its supply contracts which permitted its suppliers to cancel the contracts if the projects were not certificated by December 31, 1956. This date was, in many cases, agreed on in July, 1956 (R. 8798) when it was plain that certificates could not be granted by December 31, 1956. No evidence was offered to show that any supplier intended to cancel. And the only evidence in the record on this score showed that other contracts having cancellation clauses and a December 1, 1956 deadline had been extended (R. 8082-8088).

The Order of December 6, 1956 further required Petitioner and other opposing intervenors to file briefs in nine days, by December 15, and allowed Houston and Coastal until December 20, 1956 for filing reply briefs. The Order also directed omission of oral argument. In the latter respect, however, the order was modified and oral argument was had on December 21, 1956. Seven days later, on December 28, 1956, a week end and Christmas having intervened, Respondent issued Opinion No. 301, consisting of a 31-page majority opinion and a five-page minority opinion.

The majority in Opinion No. 301 granted the applications subject to vital conditions to be performed by Applicants at a later date without a hearing thereon. The conditions are discussed in the argument, infra. The opinion expressly stated that the only alternative to these conditions was to deny the applications (R. 20424). The dissenting opinion by two Commissioners argued vigorously that:

> "The conditions found necessary in the opinion and order of the majority confirm the fact that the project as proposed is economically impossible of completion. Even in the form which it would take if the conditions were met it would contain so many compromises with principle and rest on so much speculation for its success that the Act does not permit a finding that the public convenience and necessity requires its construction and operation." (R. 20445).

Petitioner filed a petition for rehearing of Opinion No. 301 on January 28, 1957. Meanwhile, on January 24, 1957, Houston had filed an application for rehearing which sought the elimination of some of the conditions prescribed by Opinion No. 301. On the same date, as shown by Respondent's order of February 21, 1957, both Applicants submitted revised tariffs, new service agreements, and "[v]arious supporting materials". Again on January 31, February 12, and February 13, Applicants submitted revised tariff sheets and a superseding service agreement.

Petitioner, on February 1, 1957, filed an answer to Houston's application for rehearing. Respondent's Secretary rejected and returned this answer on February 6, 1957. Petitioner, on February 12, 1957, filed an appeal to Respondent from the Secretary's action.

On February 21, 1957, respondent issued an order which denied Petitioner's appeal and, without permitting Petitioner or other opposing intervenors to make any submission in opposition and without a hearing or oral argument, in part granted and in part denied Houston's application. Some of the conditions imposed by Opinion No. 301 were eliminated or modified. Houston was given additional time in which to comply, again without provision for a hearing thereon. (Discussion of the eliminated conditions is deferred to the argument, infra.) As noted by this order, the financing plans in compliance with Opinion No. 301, were still to be submitted.

On March 25, 1957, petitioner filed a petition for rehearing of the modifying order with Respondent. Respondent's Secretary rejected and returned this on March 29, 1957. Petitioner filed an appeal with Respondent on April 4, 1957. By Respondent's order of April 18, 1957, this appeal was denied.

The subsequent actions in this Court are set forth in the Jurisdictional Statement.

RULES INVOLVED

These are set forth in an appendix hereto.

STATEMENT OF POINTS

1. Petitioner was denied its statutory right to a fair hearing:

(a) Respondent erred in ordering omission of the intermediate decision procedure. Respondent's formal recitation of the statutory language that due and timely execution of its functions imperatively and unavoidably required omission of the intermediate decision procedure was without support in, and, indeed was refuted by, the record. The Administrative Procedure Act requires an emergency as a condition to omitting the intermediate decision procedure. The record plainly shows the absence of an emergency. Respondent's order was thus arbitrary and contrary to the Act.

(b) Respondent allowed insufficient time for adequate briefing of the case.

(c) The haste of Respondent's decision shows that it could not have given the record the study and consideration necessary to meet the requirement of a fair hearing. Respondent's statement "that this case received consideration as full and careful as it would if dealt with on a routine basis" is a patent equivocation. Absent the searching analysis of the record by the Presiding Examiner, more than consideration on a routine basis is required.

(d) Respondent's certification of the projects on major conditions to be performed at a later date without a hearing thereon was incompatible with the requirements of a fair hearing.

(e) Respondent's subsequent ex parte modification or elimination of some of these conditions, while denying Petitioner the right to submit material or to be heard in opposition, deprived Petitioner of a fair hearing.

(f) Respondent erred in denying Petitioner the right to file a petition for rehearing of the order modifying and eliminating some of the conditions on which the projects were certificated.

2. Certification of the applications was without support in the record. Not only did two of the five Commissioners dissent, but even the majority found the applications so shot through with infirmities as to

require denial of the applications as an alternative to the imposition of conditions. Among the infirmities were:

(a) Financing plans too vague and indefinite to be approved. "Satisfactory" plans were required to be submitted at a later date.

(b) Insufficient evidence from which to determine what Applicants' proper rates should be.

(c) Discriminatory and preferential rates under which more would be charged for inferior interruptible service than for the firm transportation service to the power companies and under which the power companies would pay less than their share of the cost of service.

(d) Rates based, not on the cost of gas, but on the cost of a competing fuel, Bunker "C" oil. The gas rates to the power companies would be increased or decreased as the price of Bunker "C" rose or declined.

(e) Respondent found that the return to both Coastal and Houston for the first three years would be "less than fair". It nevertheless granted certificates on the assumption that the return in each case would increase. This assumption rested on two basic errors. (1) Respondent thought that the capacity of the project would be 400,000 Mcf per day, unaware of the amendment by which the facilities finally proposed would have a daily capacity of only 250,000 Mcf, (2) Respondent overlooked the fact that operations would be at capacity from the very inception and that there would be no capacity to handle any substantial increase in volume.

(f) On February 21, 1957, the date of the modifying order, there still were no financing plans and the evidentiary deficiencies as to rates could not have been corrected. There had been an increase in the transportation charges to the power companies but those rates nevertheless still remained lower than the rates for inferior interruptible service and still returned less than the cost of service to the power companies. And the arrangement for "escalation" of the gas rates to the power companies with changes in the price of Bunker "C" fuel oil were permitted to stand.

Finally, Respondent erred in certificating the projects subject to

correction of deficiencies and erred further in withdrawing in important part its requirement that the deficiencies be corrected.

3. Respondent erred in certificating the projects without first determining (a) the lawfulness of the rates charged by Coastal's supplier and (b) whether the sales to Florida Power by its suppliers would be jurisdictional and would require certification.

(a) If the rates charged by Coastal's suppliers turned out to be unlawfully low and had to be increased, the entire basis for the projects would be undermined. Coastal's rates to Houston would have to be increased and, in turn, Houston would have to increase its rates to its customers. In view of cancellation clauses which Respondent condemned but nevertheless permitted to remain in effect, cancellation might offset increases. If the rates should be too high, correction could be made only as to the future and past overcharges would be unrecoverable.

(b) The arrangement whereby Houston could "borrow" gas purchased by Florida Power and thereafter Houston, at its option, could pay for it, makes the arrangement jurisdictional and subject to the requirement that it be certificated. If Respondent so holds at a future date, Florida Power, and its suppliers, who obviously made the arrangement in order to avoid Respondent's jurisdiction, might well cancel their agreements and deprive the projects of business equal to 20% of total capacity.

4. Respondent erred in failing to make any findings as to the unfair competition and antitrust issues raised by Petitioner, thus depriving this Court of any basis for review of Respondent's decision, if any, and the reasoning in support thereof on this important question of national policy.

SUMMARY OF ARGUMENT

Petitioner intervened in this proceeding because its members were threatened with severe economic detriment and, in some cases, destruction by the projects. It is Petitioner's position that the project is economically unsound, will bring only a relatively small amount of gas into Florida at the cost of increased prices of fuel oil for the overwhelming

preponderance of fuel users, and is based in large measure on unfair competitive practices in violation of the antitrust laws.

1. Petitioner was entitled to the fair hearing prescribed by law. The cumulative effect of the various measures utilized by Respondent to rush to a decision in unreasonable haste was to deny Petitioner a fair hearing.

The Administrative Procedure Act was enacted in response to widespread criticism of administrative practices then current. After years of study and debate, certain safeguards for the integrity of the administrative process were prescribed.

A major objective of the Act was the elimination of the institutional decision in which the presiding examiner was merely a monitor and the real decision makers were anonymous staff assistants. The Act sought to achieve this objective by giving the examiner a major role in decision making and at the same time giving him independence and tenure. His objective evaluation of the witnesses, his daily absorption of the essence of the case, his time to think through its various aspects and implications, his probing analysis of the evidence, all these make his report and findings a unique and indispensable contribution to the ultimate decision. Even when overruled, his report, like the opinion and decision of a trial judge, is a vital basis for the ultimate determination.

Nevertheless, to meet situations of varying degrees of urgency, the Act authorizes a series of shortened intermediate procedures preliminary to final decision by the agency. But only in the event of a genuine emergency could all intermediate decision procedure be omitted.

Respondent ordered omission of all intermediate decision procedure and made the finding of unavoidable and imperative necessity in the statutory language. But the record plainly shows that this was a mere formality without factual support. The unavoidable and imperative necessity found by Respondent was based on the fact that Coastal had contracts with suppliers under which the suppliers could cancel if the projects were not certificated by December 31, 1956. But some of these deadlines were fixed in July 1956 when it was quite plain that, in the normal course of

events, the deadlines would not be met. Moreover, there was no evidence that a single supplier intended to cancel. And there was evidence that earlier deadlines had been extended.

On this record the omission of all intermediate decision procedure was a retrogression to the institutional decision, in violation of the plain purpose of the Administrative Procedure Act.

Compounding this violation, Respondent raced to a decision, allowing the parties grossly inadequate time for briefing and allowing itself time far too short for examination and consideration of the 20,000 page record. Respondent's equivocation is in effect an admission that its members did not read the record. In response to Petitioner's complaint that it could not have read the record, Respondent said it was "satisfied that this case received consideration as full and careful as it would if dealt with on a routine basis." But, when it deprived itself of the analysis that would have been furnished by the Examiner's Report, it became incumbent upon Respondent to give the record fuller consideration than if dealt with on a routine basis.

This attitude, that all other considerations had to give way before the overriding need for haste, characterized the decision as well. Respondent found that the applications were suffused with deficiencies, improprieties and even illegalities. The evidence was inadequate, the financing plans were indefinite, the returns were less than fair, the rates were illegal. Recognizing that the alternative was "to deny the applications", Respondent granted them subject to a number of major conditions, compliance with which was to take place in the future without further hearing.

Then, on Houston's application and filings by Houston and Coastal, all outside the record, Respondent, ex parte, modified or eliminated some of the conditions, denying Petitioner's application to submit material or to be heard in opposition.

Finally, Petitioner's petition for rehearing of the modifying order was rejected by Respondent's Secretary and Petitioner's appeal therefrom was denied.

Each of these acts and omissions was an invasion of Petitioner's

rights. Their total effect was plainly to deprive Petitioner of a fair hearing.

2. There was no basis in the record for certification of the applications. The fact is that Respondent actually found that the proposals, as made, had to be denied. In nevertheless granting the certificates, albeit subject to conditions, Respondent misconceived its statutory authority. Respondent erroneously construed the authorization in Section 7(e) of the Natural Gas Act, to issue certificates subject to reasonable conditions, as overriding the plain mandate of that section requiring denial of an application that fails to meet the statutory test. Clearly, the applications must meet the requirements of certification before a certificate may be granted. Respondent may then attach conditions that will improve the projects. But it may not certificate a project that fails to meet the requirements on the theory that later compliance with prescribed conditions will make the project eligible for certification.

(a) As already pointed out, the application was replete with infirmities which Respondent condemned. The certificates were granted on condition that these infirmities be corrected. Then by a later order, Respondent, ex parte, modified or eliminated some of the corrective conditions. Even at the date of the modifying order, there still was no satisfactory financing plan, the evidence as to the propriety of rates was still inadequate, the rates were still preferential and discriminatory, and still based, not on the cost of service, but on the price of Bunker "C" fuel oil. And Respondent's hope that the "less than fair" return would be improved by increased volume was apparently still based on (1) Respondent's assumption that the pipe line capacity would be 400,000 Mcf per day when it would actually be only 250,000 and (2) Respondent's oversight of the fact that the project would be operating at capacity from its very inception and that there would be no unused capacity to accommodate any substantial volume of new business.

(b) Respondent could not properly certificate the projects without first determining (1) the lawfulness of the rates charged by Coastal's suppliers and (2) whether the arrangements whereby Houston

could use Florida Power's gas for resale was jurisdictional and required certification.

(1) Respondent left for future determination the lawfulness of the rates charged by Coastal's gas suppliers. It is difficult to see how the economic feasibility of the project could be determined without first determining the lawfulness of this largest single element of cost in the sale of gas. If the rates were found to be unlawfully low they would have to be increased. In view of the less than satisfactory returns to Coastal and Houston, this increase would have to be passed on to the customers. In that case cancellation clauses might be invoked so as to make the increases self-defeating. On the other hand, if the producers' rates were found to be unlawfully high, the rates could be lowered only for the future. Since Respondent has no power to award reparations, there could be no recovery for past overpayments.

(2) The power companies arranged to buy their gas directly from the producers, with Coastal and Houston furnishing only a transportation service. The obvious purpose of these arrangements was to keep the power companies and their suppliers beyond Respondent's jurisdiction in respect of these sales of gas. But the arrangement also provided that Houston could "borrow" some of the gas purchased by Florida Power and could then either replace it or pay for it, at Houston's option. Exercise of this option would make the transaction jurisdictional and would require certification. But in that case Florida Power might exercise its option to cancel. In that case the market for 20% of the pipeline capacity would be gone and the feasibility of the project might be destroyed.

3. Respondent's failure to make any findings with respect to the issue whether the projected arrangements constituted unfair business practices in violation of the antitrust laws was error. The escalation arrangement would keep the price of gas always below the price of Bunker "C" fuel oil, taking into account the greater efficiency of oil. This relationship would be maintained even if the gas were sold below cost. Such an arrangement constitutes unfair business practices and a conspiracy in restraint of trade, in violation of the antitrust laws. Respondent made

no finding with respect to this issue. It is impossible to tell from Respondent's orders whether the question was even considered. Yet Respondent was obliged to consider this important question of national policy in determining whether the project met the requirements of public convenience and necessity.

Since this Court must have some basis for review and must know whether the question was considered and, if so, what was the basis for decision, the case must perforce be remanded to Respondent for appropriate findings.

ARGUMENT

I. Petitioner was denied a fair hearing.

The omission of the intermediate decision procedure was coupled with unreasonable haste of decision which allowed insufficient time either for adequate briefing or for deliberate consideration by Respondent of the extensive record. Respondent then granted the applications notwithstanding its express finding that, but for conditions imposed by Respondent, they would have to be denied. Respondent's conditions were to be complied with in future without a hearing. Thereafter, on Houston's application, Respondent, ex parte, eliminated or modified some of the conditions but denied Petitioner an opportunity to submit material or be heard in opposition. Finally Respondent denied Petitioner the right to petition for rehearing of the modifying order. Each of these acts or omissions by Respondent deprived Petitioner of a right to which it was plainly entitled. The cumulative effect of these deprivations was to deny Petitioner the fair hearing required by law.

A. The lack of time for adequate presentation to and consideration by the Respondent of the case.

The order dispensing with all intermediate decision procedure was made December 6, 1956 (R. 20337). Two weeks later, in conformity with Respondent's order, all briefs were filed (Petitioner was allowed only nine days for submission of its brief). A week later Respondent's decision was issued. The vice of the omission of the intermediate procedure, itself unlawful, was thus compounded by undue haste in presenting

and deciding the case which was wholly incompatible with deliberate consideration and decision, so essential to a fair hearing.

The sequence of events in the pell-mell termination of the case, as shown in part by Respondent's order of December 6, 1956, was as follows:

November 14, 1956. Houston and Coastal orally moved for omission of the intermediate decision procedure and for the fixing of a date for oral argument before Respondent. Petitioner and other opposing intervenors in the administrative proceeding opposed the motion (R. 6593-6608, 6663-6678).

November 28, 1956. The hearings were closed.

December 6, 1956. Respondent issued its order granting the motion and directing omission of the Examiner's decision and of oral argument. The order further shortened the minimal time previously fixed by the examiner for the filing of briefs as follows:

Parties	Date Fixed By Examiner	Date Set By Respondent
Houston, Coastal and supporting intervenors	December 5, 1956	December 5, 1956
Staff	December 10, 1956	December 10, 1956
Opposing intervenors	December 20, 1956	December 15, 1956
Reply briefs	December 27, 1956	December 20, 1956

December 7, 1956. Petitioner moved for additional time for the filing of its brief. Respondent denied the motion but modified its earlier order by permitting oral argument which was set for December 21, 1956 (R. 20355).

December 20, 1956 (Thursday). Reply briefs were filed.

December 21, 1956. Respondent heard oral argument.

December 28, 1956. (A week end and Christmas having intervened). Respondent issued Opinion No. 301 which decided the case on the merits (R. 20405).

The record in this case consists of some 20,000 pages. There were

approximately 50 witnesses and hundreds of exhibits. From the date of filing of the last briefs until issuance of Opinion No. 301 on December 28, 1956, the Commissioners had only seven days in which to familiarize themselves with the record and briefs, hear oral argument, meet to discuss and decide the case, and issue a 31 page majority opinion and a five page dissent. Even assuming that, without waiting for briefs, the Commissioners, without benefit of briefs or argument, began to examine the record as soon after the close of the hearings on November 28, 1956, as the transcript was prepared, the time was still insufficient for full study, in view of the Commissioner's many other duties. Indeed there was insufficient time even for the preparation of adequate summaries by the staff.

The absence of the Examiner's report and the unjustifiable haste with which briefs, argument and decision were disposed of, unavoidably resulted in inadequate presentation of the case to Respondent and obviously in only the most cursory and superficial examination of briefs and record by Respondent.

Respondent's order of February 21, 1957, denying application for rehearing (R. 20897), brushed aside this objection of Petitioner by stating without more, (R. 20907) "we are satisfied that this case received consideration as full and careful as it would if dealt with on a routine basis." This equivocation plainly overlooks the fact that, in cases dealt with on a routine basis, Respondent has the benefit of the probing and analytical discussion and findings of the Hearing Examiner. He is the one person in the decision making group who has observed the witnesses and heard the testimony and who, moreover, has the "thinking time" so necessary to proper assimilation of the case as a whole. Something more than consideration as "full and careful" as it would be if based on the Examiner's report is required when Respondent has deliberately shorn itself of that report and its searching and illuminating analysis of the record.

Respondent deems its obviously perfunctory consideration of the record a sufficient compliance with the requirements of a fair hearing. But its compliance, if such it was, plainly was formal rather than real.

And the administrative agency demeans its high function when it bends the knee to form and turn its back upon the purpose and substance of a hearing.

The teaching of Morgan v. United States, 298 U.S. 468 (1936), is that those who are entitled to a hearing must be accorded a hearing in a substantial sense. Chief Justice Hughes there said, at pp. 481-482:

> "But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

B. The unlawful omission of the intermediate decision procedure.

Enactment of the Administrative Procedure Act, 5 U.S.C. 1001, et seq., was the culmination of years of study of administrative agencies and proposals for legislation to assure the integrity of the administrative process. Largely responsible for its enactment was widespread and mounting criticism of the lack of independence of the examiner who exercised the judicial function for the agency which was at once prosecutor, judge and executioner. Frequently he had no real power to decide, acting merely as a monitor of the proceedings. Decisions were made institutionally on the basis of recommendations of anonymous members of the staff.

Two fundamental improvements were effected by the Act. Examiners were given independence and tenure to enable them to perform their quasi-judicial functions objectively and without fear of agency disapproval. Ramspeck v. Federal Trial Examiners' Conference, 345 U.S. 128, 130-132 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). And the requirement of section 8, 5 U.S.C. 1007, of initial decision by the examiner was expected largely to obviate the institutional decision.

Congressman Walter, Chairman of the Subcommittee which had considered the bill, reported to the House (S. Doc. No. 248, 79th Cong., 2d Sess., p. 366):

"Next to the matter of evidence, which I have discussed in connection with section 7(c), the manner and method in which agencies arrive at decisions have been one of the most criticized parts of the field of administrative law. With respect to this problem the final report of the Attorney General's Committee on Administrative Procedure had the following to say — pages 44-46:

'In most of the agencies the person who presides is an adviser with no real power to decide * * *. He may simply be a monitor at the hearing with power to keep order and supervise the recording of testimony but little or none to make rulings or to play a real part in the final decision of the case. * * * There should be general improvement in administrative procedure at this stage. * * * The committee . . . has been impressed with the fact that as the conduct of the hearing becomes divorced from responsibility for decision two undesirable consequences ensue. The hearing itself degenerates, and the decision becomes anonymous. * * *

'If the hearing officer is not to play an important part in the decision of the case, other persons must. The agency heads cannot read the voluminous records and winnow out the essence of them. Consequently this task must be delegated to subordinates. Competent as these anonymous reviewers or memorandum writers may be, their entrance makes for loss of confidence. Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who must in the first instance decide or recommend the decision. In many agencies attorneys rarely exercise the privilege of arguing to the hearing officer. They have no opportunity to argue to the record analysis and reviewers who have not heard the evidence but whose summaries may strongly affect the final result.'

"The provisions of section 8 are designed to make it certain that those who sign decisions or decision papers are actually the people responsible for them, that the evidence and the arguments of the private parties are fully and fairly considered, that the views of agency personnel are not unduly emphasized or secretly submitted, and that the official record alone is the basis of decision."

It was plainly intended that the examiner would play a significant, indeed a key, role in the decision making process. Even if the agency overruled him, as of course it could, his would be the unique contribution of analysis and findings on the basis of his own observation of the witnesses,

his assimilation of the evidence, and his ability to devote himself exclusively to the one case. Whether or not he is overruled, his report is a part of the record and must be given due weight both by the agency and the courts. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 494 (1951); Utica Observer-Dispatch v. National Labor Relations Board, 229 F. 2d, 575, 577 (2d. Cir., 1956).

The right to a genuine hearing, expressly protected by statute, is reduced to a matter of administrative grace and favor if the hearing examiner may be relegated back to the status of monitor. Section 8(a) of course permits omission of all intermediate procedure but only in the exigency of imperative and unavoidable necessity. And it only labors the point to note that a mere "boiler plate" finding in the language of the Act does not satisfy the statutory condition where, as is the case here, the finding is not supported by the facts.

Section 8 gives the agency a choice of several methods of hearing and decision. In essence these are as follows:

1. The agency may itself preside over and decide the case;

2. If the agency does not itself preside, the presiding examiner makes the initial decision which, absent appeal, becomes the agency decision. In this situation, as in the next two, prior to the initial, recommended or tentative decision, the parties must be afforded an opportunity to submit findings and conclusions or exceptions and supporting reasons.

3. The agency, although not having presided at the hearings, may itself make the initial decision. In such case, the examiner first makes a recommended decision;

4. The agency, although not having presided at the hearings, may issue a tentative decision or any of its responsible officers may recommend a decision;

5. Although the agency has not presided at the hearings, it may omit all intermediate procedure if it "finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires".

Thus, the agency has been authorized to emply a number of types of hearings each geared to a different degree of urgency. If, at the inception of the proceeding, it appears that prompt action is necessary the agency, if it deems it feasible and desirable to do so, may itself hear and decide. On the other hand, if the casebe heard by an examiner and a need for prompt decision appears, it may shorten the procedure as in methods 2, 3 and 4, supra. The point to be noted is that each of the first three methods results in a decision, whether tentative or final, by the one who presided at the hearings. And even under the fourth method, as well as the second and third, opportunity must be afforded the parties to submit proposed findings or exceptions and thus point up the significant facts of record before the final decision is made.

Even if the Act had not attached a condition to the use of the fifth method, under which all intermediate procedure is omitted, it would still be implicit that this method is to be used only in the case of a genuine emergency. Nevertheless, Section 8 makes this explicit. It requires a finding that due and timely execution of the agency's functions imperatively and unavoidably require the omission. The legislative history shows that what was contemplated was a real emergency.

There was no authorization for omission of the intermediate procedure in the bills as originally introduced. But Commissioner Aitchison of the Interstate Commerce Commission appeared at the hearings on the bill and testified to the need for authority to act promptly in emergency situations. He illustrated this by reference to a case in which testimony was taken in 4-1/3 days and the following Monday the Commission heard argument. He felt that the requirement of intermediate procedure would make such prompt action impossible. He gave further illustrations of emergencies in the cases of assigning priority in coal cars and of routing of freight in disregard of shippers' instructions. S. Doc. No. 248, supra, pp. 106, 116, 117.

Congressman Walter, reporting to the House, said "such procedure [tentative or recommended decision] may be wholly omitted where the execution of agency functions make it impossible." S. Doc. No. 248,

p. 367. And the Attorney General's statement on the bill, submitted as an appendix to Senate Judiciary Committee Report No. 572, said that the exception permitted the agency, in lieu of any preliminary report, to issue forthwith its final order "in the emergent instances indicated." S. Doc. No. 248, p. 229.

There was no emergency in this case.

Respondent's unsupported pro forma finding. Respondent made a finding of imperative and unavoidable necessity in the statutory language (R. 20338). This finding was based solely on the fact that Coastal had entered into 47 contracts for the purchase of gas and that in all of these contracts "provision is made for the cancellation thereof if Coastal has not received a certificate of public convenience and necessity from the Commission by December 31, 1956." (R. 20337). Actually the contracts merely gave the gas suppliers an option to cancel and the record is completely bare of any evidence that even a single supplier intended to exercise the option. Indeed, the evidence is to the contrary.

At the argument of the motion to omit the intermediate decision procedure counsel for the instant Petitioner called attention to the fact that contracts had been entered into in February 1956, with options to cancel in July 1956, if the project was not certificated by then. These contracts were modified to provide December 31, 1956, deadlines. (See, e.g., R. 6666, 8746-8800, 8857-8860). So also Florida Power and Florida Power and Light had contracts with suppliers under which there were options to cancel if the certificates were not granted by December 1, 1956. But the record shows that in November 1956, prior to the date of Respondent's order omitting the intermediate procedure, these contract deadlines actually were extended to March 1, 1957. (See e.g., R. 14644, 14648).

The contracts, in any event, were voluntarily made in February and modified in June 1956, on each of which dates both Houston and Coastal must, or at least should, have known that proceedings such as these are protracted and most unlikely to be decided in the time specified by their contracts.

Respondent might reasonably have been expected to resist such built-in pressure. And it should indeed have done so in view of the fact, as we shall show infra, that certification of the applications would constitute an insurmountable threat to the economic life of Petitioner's members. The existence of so serious a conflict in interest should have dictated full opportunity for thorough presentation and careful consideration and decision of the case.

Respondent's order of December 6, without reference to the need for adequate consideration of this threat, nevertheless did evidence concern lest Respondent appear to be permitting itself to be pressured into hurried action by deadlines set by Applicant. Respondent thus made it a point to state (R. 20338):

> "However, it must be understood that the Commission in granting this motion is giving primary consideration to the public interest and not adopting a policy of permitting applicants to fix and assert date deadlines within which time the Commission must act on applications for certificates of public convenience and necessity as a ground or basis for waiver of the intermediate decision procedure."

And it renewed its protestation in Opinion No. 301, in which it said, (R. 20412):

> "So although we do approve and will not countenance attempts by any party to hasten decision by fixing or asserting deadlines, in this case it is in the public interest that our decision be issued before the end of the year."

Thus, having duly paid lip service to the principle of resistance to the pressure of deadlines created by Applicants, it proceeded forthwith to yield to such pressure. And it did so in the absence of evidence that there would in fact be any cancellations and in the face of the evidence that contracts had been and were being extended.

This Court should not give its approval to such patent nullification of the safeguards so carefully prescribed by Congress in the Administrative Procedure Act to insure fair hearings. There was no emergency, no imperative and unavoidable necessity, to justify omission of the intermediate decision procedure. The omission was thus unlawful, doubly so

when coupled with the merely token consideration which is all that could possibly have been given to this case.

While Petitioner urges additional grounds for reversal, infra, it is appropriate to note that the unlawful omission of the intermediate decision procedure is itself prejudicial error and would require reversal even if it stood alone. Channel 16 of Rhode Island v. Federal Communications Commission, 97 U. S. App. D. C. 179, 229 F. 2d, 520, 524 (1956).

C. The granting of the applications which respondent found should have been denied; the wrongful exclusion of petitioner from further proceedings.

Having expressly found that the applications as made would have to be denied, Respondent nevertheless, in Opinion No. 301 (R. 20411-20449) granted the applications but attached conditions so substantial as in effect to amount to a grant of new applications without a hearing and upon evidence outside the record. The ex parte order of February 21, 1957 (R. 20897-20912), on Houston's application and material submitted outside the record, without a hearing, substantially modified or eliminated some of the conditions and at the same time denied petitioner the right to appear, submit evidence or be heard in opposition. Petitioner was thereafter denied the right to petition for rehearing of the February 21 order.

Again, a statement of the sequence of events may be helpful:

December 28, 1956. Opinion No. 301 issued.

January 24, 1957. Houston filed an application for rehearing requesting elimination of some of the conditions imposed by Opinion No. 301.

January 28, 1957. Petitioner filed petition for rehearing of Opinion No. 301.

February 1, 1957. Petitioner filed an answer to Houston's application.

February 6, 1957. Respondent's Secretary rejected and returned Petitioner's answer.

February 12, 1957. Petitioner appealed to Respondent from its

Secretary's rejection of the answer.

February 21, 1957. Respondent issued its order of February 21, 1957, granting in part and denying in part Houston's request for modification of conditions, denying a stay and denying the appeal from the Secretary's rejection of the answer.

March 25, 1957. Petitioner petitioned for rehearing of Respondent's order of February 21, 1957.

March 29, 1957. Respondent's Secretary rejected and returned the petition.

April 4, 1957. Petitioner appealed to Respondent from its Secretary's rejection of petition.

April 18, 1957. Respondent denied Petitioner's appeal.

1. Opinion No. 301.

Opinion No. 301, two Commissioners dissenting, granted certificates to Houston and Coastal but on terms materially different from those upon which the applications were based. The grant of authority was made subject to numerous substantial conditions (R. 20439-20441). These conditions so changed the proposals on the basis of which the hearings were held as to require instead an order denying the applications without prejudice to new applications in conformity with the specified conditions. Indeed, Respondent frankly stated, at p. 14 (R. 20424) of the opinion:

> "Thus, although the conditions which we shall impose are substantial, the only alternative is to deny the applications."

Had this been done there would perforce have been a hearing as to the propriety of the conditions and Applicants' ability and willingness to comply with them. The grant of the applications subject to a later showing of compliance with these conditions deprived Petitioner of the hearing to which it was entitled.

In McClatchy Broadcasting Co. v. Federal Communications Commission, 239 F. 2d 19 (D.C. Cir., 1956), cert. den., 353 U.S. 918, this Court said, at p. 24:

> "We think that modifying some of the basic characteristics of a construction permit is tantamount to the issuance

> of a new and different permit. To do this without affording the parties to the comparative hearing a chance to protest and be heard amounts to granting a permit for construction that had not been proposed before or during the hearing and which therefore had not been compared with the proposals of other applicants."

The case was remanded to the Commission for an evidentiary hearing.

In the instant case, as shown by Opinion No. 301, Respondent found that Applicants' proposals were shot through with vitiating defects. Thus (a) there was insufficient evidence on which to determine what Houston's rates for transporting gas for the power companies properly should be (R. 20427); (b) nevertheless, these rates were plainly insufficient to cover the cost of service and were discriminatory (R. 20427); (c) the transportation rates to the power companies improperly were related, not to the cost of service, but to the cost of a competing fuel and would rise or fall one cent per Mcf respectively with every increase or reduction of 6.6 cents per barrel in the price of Bunker "C" fuel oil (R. 20426-20430); (d) the power companies could cancel their contracts on the basis of a number of contingencies or reduce their gas purchases, in either of which events Applicants would be left with large unused capacity (R. 20425-20428); (e) Coastal, although undertaking to transport gas for the power companies had no contract with them and Coastal's costs of transportation service were not set forth separately from its costs for other classes of services (R. 20429); (f) the contract between Coastal and Houston contemplated an excessive rate of return to Coastal and specified that Coastal would reduce its bill to equalize the rate of return of each, thus failing to meet the requirement that a rate be definite and certain and also constituting an automatic price adjustment clause in violation of Sec. 154.38 of respondent's regulations (R. 20431); (g) Coastal's tariff covering gas from its own reserves resulted in an escalation provision in violation of the same section and also of Sec. 154.22 which requires that tariffs be filed not more than 60 days before their effective date (R. 20432); (h) the financing proposals of both Applicants did "not attain a reasonable standard of safety and stability", both providing for inadequate equity

capital (R. 20434-20435); (i) there was "indefinitiveness of the total amount of funds to be raised by Houston" and "lack of information in the record as to the nature of the financing" and evidence in the record that a change in the plan of financing would raise doubt as to Houston's ability to finance its project (R. 20435-20436), and, finally, (j) the return to each applicant for the first three years would be "less than fair" (R. 20422).

Accordingly, Opinion No. 301 required that Applicants file new tariffs and new service agreements correcting the deficiencies and submit new financing plans satisfactory to Respondent (R. 20439-20440).[2]

Serious questions were raised by these conditions.

Were the certificated projects feasible? Could or would the Applicants, the producers and the power companies consent to and comply with the conditions? The fact is that the conditions were substantially modified by Respondent's order of February 21, 1957. Above all, did the certificated projects meet the requirements of public convenience and necessity? The projects as certificated were not the projects applied for, and with respect to which hearings had been held. As Commissioner Connole, joined by Commissioner Kline, dissenting, said (R. 20445-20446).

> "The conditions found necessary in the opinion and order of the majority confirm the fact that the project as proposed is economically impossible of completion. Even in the form which it would take if the conditions were met it would contain so many compromises with principle and rest on so much speculation for its success that the Act does not permit a finding that the public convenience and necessity requires its construction and operation."
>
> * * * * *
>
> "The infirmities in the arrangements between the power companies and the applicants as proposed by the applications are fully and clearly discussed in the majority opinion herein. The so-called cancellation clause, however it would be interpreted ultimately by the parties, the necessary acceptance

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[2] To illustrate the procedural snarl that could easily result from such patently improper reliance on material outside the record, if Houston and Coastal submitted financing plans unsatisfactory to Respondent and sought judicial review of Respondent's rejection, there would be no record for review.

> by the Commission of rates admittedly made with no reference to the recovery of even out-of-pocket costs, the complete surrender of control by the Commission over effective rate regulation made necessary by power companies requirement that its total natural gas costs not exceed alternative fuel costs, all are plainly inconsistent with fundamental regulation. All have been rejected, as have been other proposals. I am wholly in agreement with these conclusions.
>
> "But, once having rejected the proposal, majority offers an alternative which is not a practical one, nor one which in my opinion, would solve the problem."

Whether the majority sponsored alternative was feasible, was a practical solution to the problem or was indeed required by the public convenience and necessity, were questions that were required to be answered on the basis of the probing test of an adversary hearing.

This is implicit in the majority's statement (R. 20414):

> "We are here called upon to determine whether or not Coastal and Houston Gas have shown that the authorizations they seek satisfy the requirements of public convenience and necessity embodied in Section 7(c) of the Act including such elements as an adequate gas supply, adequate markets, facilities which are reasonable and feasible from the standpoint of cost and design, reasonable and feasible financing, and the economic feasibility of the projects."

These criteria had to be applied to the projects as amended by Respondent as well as the projects applied for. But, having made a determination adverse to the original projects, the majority proceeded to certificate them subject to conditions that extensively altered their fundamental character. Actually, these were new projects which, under Section 7(c) of the Natural Gas Act, 15 U. S. C. 717f(c), could not be certificated without a hearing. cf. Public Utility District No. 1 v. Federal Power Commission, 242 F. 2d 672 (9th Cir., 1957).

The issue is not, as Respondent intimated, whether it has authority to attach conditions to its grant of a certificate. The point is that when, as here, the conditions transform the projects into something wholly different from those applied for and which were the subject of the hearing, a hearing is required as to the new projects. That, as we understand it,

was the plain meaning of the Court's holding in the McClatchy Broadcasting case, supra.

Respondent completely missed the point and indeed stated its authority so overbroadly as to warrant judicial correction in the interest of proper administration, not only in this case, but for the future as well. Respondent said (R. 20904):

> "No party can question the Commission's power under Section 7(e) to 'attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require,' as the Act in terms provides. Clearly, under the statute, the only hearing required to support the imposition of a condition which is reasonable and required by public convenience and necessity is the specific and only hearing for which the pertinent section makes provision — the hearing on the certificate application. That hearing was had, and was full and adequate. The record was extensive and on the basis of it the Commission could either accept the project as proposed or at its discretion impose the reasonable conditions the public convenience and necessity required to bring the tariff and financing proposals into conformity with the Act's standards.[3] We chose the latter course." (Footnote added by Petitioner.)

Respondent's formalistic conception of the requirements of a fair hearing is thus plainly evidenced. In its view, those requirements were satisfied by the holding of a hearing, even though at that hearing vital elements of the projects as certificated were not and could not be considered. That hearing was concerned with tariffs that were then fixed, contracts that had already been entered into and financing plans, however indefinite, that were then proposed. Respondent's Opinion No. 301 required new tariffs to be filed, new contracts to be executed and new financing plans "satisfactory to the Commission" to be submitted. All these necessarily would be outside the record of these proceedings. Nor were copies required to be served upon Petitioner or other opposing intervenors. Yet when Petitioner requested an opportunity to be heard with respect to them Respondent's "Mama knows best" reply was, in

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[3] Significantly, respondent seems to have overlooked completely its authority to deny the application.

effect, that these were no longer petitioner's concern.

Respondent's reliance (Order of February 21, 1957) (R. 30905) upon Civil Aeronautics Board v. State Airlines, 338 U.S. 572 (1950), is misplaced. The logic of both the majority and the minority opinions negates the propriety of Respondent's position. In an area proceeding for the awarding of air routes State Airlines complained of a denial of an opportunity to show that Piedmont, the successful applicant was not qualified. The majority did not hold that it was not entitled to such opportunity but actually found as a fact that it had been given the opportunity sought. The Court said, at p. 579:

> "*** State did fully recognize that Piedmont was a potential competitive applicant in the consolidated proceedings. Their applications in large part sought certificates in the same general area. Each argued against the other before the Board."

The insistence of Justices Reed and Frankfurter on an even stricter standard of adherence to prescribed procedure does not detract from the plain holding of the majority that State Airline had actually had the opportunity it claimed it was denied. In the case at bar, however, the transformed projects certificated by respondent could not be and were not anticipated or subjected to the testing of a hearing. And, in any event, in the State Airline case the Civil Aeronautics Board, in an expression of concern for the rights of all parties, "granted State a limited hearing to show, if it could, that the proceeding should be reopened to enable State to offer new evidence against Piedmont's fitness and ability." 338 U.S., at p. 579. Respondent in the instant case denied Petitioner and other opposing intervenors any opportunity to be heard.

Moreover, Section 7(c) of the Natural Gas Act and Section 7 of the Administrative Procedure Act, 5 U.S.C. 1006, prescribe a hearing affording the parties full opportunity to disclose all the facts, and these Sections further require that the decision be based exclusively on the facts of record. Section 7(c) of the Administrative Procedure Act provides in relevant part:

> "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

And Section 7(d) provides:

> "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with Section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.[4]

Petitioner was thus denied a hearing in a dual sense: (a) there was no hearing with respect to the projects as certificated which were not the projects as to which hearings were held. McClatchy Broadcasting Co. v. Federal Communications Commission, supra; and see West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 62, 77 (1935); W. S. Butterfield Theaters v. Federal Communications Commission, 237 F. 2d 552, 556, 557 (D. C. Cir., 1956); Enterprise Company v. Federal Communications Commission, 231 F. 2d 708 (D. C. Cir., 1955); and (b) the projects were certificated on the basis of tariffs, contracts and financing plans, all to be submitted outside the record, and with no hearing to be held thereon. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 300 (1937); United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14 (1912); Saltzman v. Stromberg-Carlson Telephone Mfg. Co., 46 F. 2d 612, 614 (D. C. Cir., 1921).

2. Order of February 21, 1957.

Having found that the projects applied for could not be certificated except on the basis of the specified conditions, Respondent, nevertheless,

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[4] If opportunity must be afforded to rebut officially noticed facts outside the record, then a fortiori, like opportunity must be afforded with respect to the new tariffs, contracts and financing plans, all of which are outside the record.

by its ex parte order of February 21, 1957, eliminated some and modified other conditions. This was done on the basis of tariffs and contracts submitted outside the record on an application by Houston as to which no hearing was held and with respect to which Petitioner's application to be heard was denied. Moreover, as of the date of this order, Applicants' compliance with Respondent's conditions as later modified, was still off in the indefinite future. As Respondent noted, no financing plans had been filed (R. 20898). And this order rejected some of the new contracts and parts of the tariffs and again required other new contracts and parts of tariffs to be filed.

One of the major conditions withdrawn was the one requiring elimination of escalation provisions that geared the price of gas, not to the cost of service, but to the cost of Bunker "C" fuel oil. Opinion No. 301 criticized these provisions at some length as discriminatory and not returning the cost of service (R. 20417, 20425-20427).

The order of February 21, 1957, however, makes no reference to these provisions. It merely notes that the transportation rates to the power companies was increased two cents per Mcf. It is the concurring opinion attached to this order that points out that the escalation provisions have been retained.

Entirely apart from any question of a fair hearing, these escalation provisions are unlawful and beyond the authority of Respondent to approve. Section 4(b) of the Natural Gas Act, 15 U.S.C. 717c(b), expressly provides:

> "(b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

In this connection it bears repeating that Respondent's finding that the escalation provisions are discriminatory stands unmodified.

In addition to permitting the escalation provisions to stand,

Respondent withdrew its requirements that the minimum bill provisions in Houston's contracts be changed and that certain options by customers to cancel be eliminated (R. 20901), and further permitted Houston to allocate costs during the first year so as to give preference to transportation service if such service is not required to be curtailed during peak days (R. 20899).

Elimination of some of the conditions to which "the only alternative is to deny the applications" (Opinion No. 301. R. 20424) aggravated the effect of the failure to hold a hearing with respect to the projects that were actually certificated. Such modification could not properly be made ex parte.

Respondent's apologia for such unauthorized procedure is altogether glib. Respondent said, at p. 9 (R. 20905) of its order of February 21, 1957:

> " *** accepting for the moment the foregoing argument that the conditions imposed change the projects, relieving Houston Gas Gas of the necessity for complying with some of the requirements of those conditions as set forth above likewise removes to such extent the ground for complaint on this score."

Again, respondent's formalistic conception of the requirements of the administrative process prevents it from understanding the difference between a mere failure to impose certain conditions ab initio and a withdrawal of those conditions after a finding of their essentiality.

That the distinction is a vital one has been recognized judicially in a consistent line of analogous cases. In these the Interstate Commerce Commission had issued an order suspending reduced rates and had made the supporting findings therefor. It then revoked its suspension orders. In each case a different statutory three-judge court set aside the order, holding that the initial findings could not be brushed aside except upon sound grounds based upon the record. This, notwithstanding that 49 U. S. C. 15 (7) does not require the Commission to state its reasons when suspension of proposed rates is denied in the first instance. Amarillo-Borger Express v. United States, 138 F. Supp. 411 (N. D. Tex., 1956); Long Island Railroad Company v. United States, 140 F. Supp. 823 (E. D.

N. Y., 1956); Dixie Carriers v. United States, 143 F. Supp. 844 (S. D. Tex., 1956). Here not only was there complete absence of reason for withdrawal of the condition requiring elimination of the escalation clauses but this and the other modifications were based on material outside of the record. As was said in the Amarillo Borger case, 138 F. Supp., at pp. 419, 420:

> "If, as may be suggested by the order of November 14, the Commission felt that there was information contained in the petition to vacate which justified or required the change in its conclusions, the Commission could easily have given sufficient elaboration of the file record to enable parties, counsel, and reviewing tribunals to determine whether this was the act of genuine judgment, deliberate discretion and reasonable decision, or whether it was hasty, ill-considered, precipitous action with no substantial basis for it."

Respondent's order of February 21, 1957 wholly failed to meet the minimal requirement.

The deprivation of Petitioner's rights was climaxed by Respondent's refusal to permit Petitioner to petition for rehearing of the modifying order. The totality of Respondent's steps beginning with the order directing omission of the intermediate decision procedure was effectively to deny Petitioner the fair hearing required by law.

II. The Certification Orders Are Not Supported By the Record and Are Otherwise Unlawful.

It bears repetition that Respondent conceived its duty in this case to be:

> "...to determine whether or not Coastal and Houston Gas have shown that the authorizations they seek satisfy the requirements of public convenience and necessity embodied in Section 7(e) of the Act including such elements as an adequate gas supply, adequate markets, facilities which are reasonable and feasible from the standpoint of cost and design, reasonable and feasible financing, and the economic feasibility of the projects. (Opinion No. 301, R. 20414).

Respondent found that the applications did not meet the requirements of public convenience and necessity and, without changes effected by the

substantial conditions it imposed, would have to be denied. (R. 20424). Respondent regarded itself as limited to a choice between only two courses of action, either to accept the projects as proposed or else to certificate them subject to conditions (order of February 21, 1957, R. 20904). Seemingly, Respondent gave no consideration to the mandate of Section 7(e) of the Act that if the application failed to meet the specified requirements "such application shall be denied."

The force of this mandate is not dissipated by the statutory authority to issue certificates subject to reasonable terms and conditions. For, at the very most, that authority can mean no more than that conditions may be imposed that would, in Respondent's judgment, improve a project that nevertheless meets the test of Section 7(e) without the modifications effected by the conditions.

If that had not been the legislative intent, the purpose could have been made plain by a simple provision, for example, that if the application failed to meet the statutory test, respondent could either deny the application or grant the certificate subject to reasonable conditions. Instead, Section 7(e), without qualification, directs that the application be denied. And where, as here, the applications have been found not to meet the test and are transformed into new projects by conditions that change the financing plans, the allocations of cost of service, the rates charged and the basic contracts, it is a circumvention of the statutory purpose to do more than deny the applications without prejudice to renewal. One of the effects of such circumvention is the denial of a hearing as discussed above.

A. Respondent's finding that the applications as made failed to meet the requirements of public convenience and necessity is fully supported by the record.

The burden of proof was on the Applicants. Section 7(c), Administrative Procedure Act, 5 U. S. C. 1006(c). They failed to sustain this burden.

1. Financing. The financing plans of both Applicants provided for

equity capital of substantially less than 15% of the total capital. Respondent held that this was inadequqte and required a minimum equity of 15% (Opinion No. 301, R. 20435-20440). Moreover, the record shows that, because Houston had not decided how it would treat certain distribution projects, it had not formulated any definite plan of financing (R. 7489-7502). And Respondent so found. It said:

> "In view of the indefiniteness of the total amount of funds to be raised by Houston Gas for the purpose of acquiring properties in Florida and the lack of information in the record as to the value of the financing to be employed, we will require that Houston Gas submit its complete plan for financing, prior to undertaking to put it into effect". (Opinion No. 301, R. 20435).

Houston's financial witness testified that there was doubt that a requirement of 15% equity could be met under existing market conditions (R. 7501-7502). Respondent stated that it would require the 15% equity even though it was "not unmindful" of this evidence (Opinion No. 301, R. 20435-20436). Finally, Respondent required that:

> (d) Houston Gas and Coastal shall submit for approval prior to undertaking to put it into effect a financing plan satisfactory to the Commission. (Opinion No. 301, p. 30) (R. 20440).

The effect of this was that no satisfactory plan for financing was before Respondent when it certificated the projects on December 28, 1956 (nor, indeed, when it modified its conditions on February 21, 1957). The Certificates were granted on the basis of financing plans to be submitted at some date in the indefinite future.

Section 7(e) of the Natural Gas Act requires a finding that the applicant "is able and willing properly to do the acts and to perform the service proposed." And Respondent deemed itself called upon to determine whether the financing of the projects was "reasonable and feasible" and also whether the projects were economically feasible (Opinion No. 301, R. 20414). It plainly could not make these findings on the basis of financial plans that were not before it and would not be submitted or even

formulated until a later day.

2. Economic feasibility. Originally the applications proposed a transportation capacity of 400,000 Mcf daily. Due to inadequate supply, this was amended to provide a 250,000 Mcf daily capacity (R. 338-368).[5] Applicants' contracts covered their total capacity (R. 14432). Consequently, Applicants' operations would be at capacity from the very outset. What this means is that any substantial increase in revenue would have to come either from new construction to enlarge projected capacity or from increased rates.

Respondent found that:

> "When the expected revenues of Coastal and Houston Gas are applied to the rate bases, after deducting operating expenses and debt expenses, the return in each case for the first three years appears to be less than fair, but as the return appears to increase each year and as the demands of the markets may reasonably be expected to grow, the load factor and the return should continue to increase." (Opinion 301, R. 20422).

Respondent was patently laboring under the illusion (see footnote 5, supra) that Applicants' capacity would be 400,000 Mcf daily and that they would thus have unused capacity with which to supply increased demand. But applicants would have no unused capacity. Increased demand would have to be met by new construction. So that no real improvement in the "less than fair" rate of return could be expected and the Applications therefore were not economically feasible.

3. Lack of proof as to proper rates. Houston further failed to sustain its burden of proving the economic feasibility of its project in the respect of adequacy of its rates. Respondent found:

> "Thus, although the evidence is not sufficient to enable a determination of precisely what the proper rate should be, it sufficiently supports the conclusion that Houston Gas' presently proposed rates are not designed to require each class of service to bear its proper share of cost."

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[5] Respondent's footnote 6, p. 15, Opinion No. 301, (R. 20425) states that the facilities of Houston Gas were designed to transport a daily volume of 400,000 Mcf. Respondent apparently was unaware of the amendment.

B. The projects proposed and those certificated both violate the Natural Gas Act.

1. Provision for changes in the price of gas on the basis of prices of a competing fuel is unlawful. As noted above, the arrangements provided that the price of gas transported for the power companies would be increased or decreased one cent per Mcf for every rise or fall of 6.6 cents per barrel in the price of Bunker "C" fuel oil. Notwithstanding Respondent's disapproval of this arrangement (Opinion No. 301, R. 20425-20427-20429-20430) it was permitted to be maintained. . . . (Order of February 21, 1957, concurring opinion, R. 20911-12). As Respondent found, this resulted and would continue to result in an unequal distribution of the cost of service so that each class of service would not bear its proper share (Opinion No. 301, R. 20427). This constitutes an undue preference in violation of Section 4(b) of the Natural Gas Act. It also violates Respondent's Regulations, Section 154.38 (d) (3):

> "No rule, regulation, exceptions, or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution thereof of any rate or charge."

2. The rates proposed and those finally approved give an unlawful preference to the power companies and maintain unreasonable differences as between classes of service. The rates for transporting gas for the power companies, as originally proposed, were substantially less than the cost of service (Opinion No. 301, R. 20426-20427). Although this is a firm service (R. 20419 and 20427) and therefore superior to the preferred interruptible service for other customers, the rate for the latter was almost 7 cents per Mcf (million B.t.u.) above the cost of service (ibid). Respondent originally withheld approval of the rates to the power companies.

It appears from Respondent's order of February 21, 1957, that the

transportation rates to the power companies were increased barely enough to equal the cost of service (R. 20900). But these rates remained far out of line with the rate for the inferior preferred interruptible service which was unchanged.

The defect in the rates, noted by Respondent, that they were "not designed to require each class of service to bear its proper share of costs" (Opinion 301, R. 20427), was therefore not corrected.

Consequently, the approved rates, like those originally proposed, fall afoul of the provisions of Section 4 (b) of the Natural Gas Act which prohibit the granting of undue preferences and advantages and the maintenance of unreasonable differences in rates as between classes of service.

C. Respondent's failure to determine (1) the lawfulness of the rates charged by Coastal's suppliers and (2) whether sales of gas by or to the power companies would be subject to the Act made certification of the instant projects unlawful.

1. The rates charged by Coastal's suppliers. The sales by Coastal's suppliers of gas for resale by Coastal are subject to the Natural Gas Act. Respondent granted certificates to these suppliers without considering the reasonableness of their rates, saying that these rates are subject to its "continuing supervision and control and if sufficient reason appears therefor, can be considered on the basis of a factual record developed in an appropriate proceeding under the Act." (Opinion No. 301, R. 20436). Coastal's greatest single cost is the cost of gas (see e.g., Opinion No. 301, R. 20426-20427). It is difficult to understand how the public convenience and necessity of the projects could be determined without first deciding the reasonableness of the most important cost factor in the case.

If Respondent had considered the reasonableness of the producers' rates and found them either too high or too low, it could have withheld certificates. If then Coastal and its suppliers wanted the projects

approved they would have contracted for different rates satisfactory to Respondent. This is precisely what happened in the case of gas for the power companies. After Respondent issued Opinion No. 301, condemning Houston's transportation rates to the power companies as discriminatory because below the cost of service, the suppliers agreed to reduce their prices by two cents per Mcf and Houston was thereby enabled to increase its transportation rates by two cents without additional cost to the power companies.

The producers' rates might be too high or too low without being unlawful. Nevertheless, by withholding certificates, any increase or decrease in rates could be effected on the basis that the one or the other would best satisfy the overall needs. Once the certificates were issued, however, the rates established by contract could not be changed except by agreement between the contracting parties or else by a finding by Respondent that the rates were unlawful. United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956); Federal Power Commission v. Sierra P. P. Co., 350 U.S. 348 (1956).

Even if Respondent should find the producers' rates to be unlawful, its ability effectively to correct them would be impaired by the fact that the certificates have already been issued. If the producers' rates were found to be too low, an increase might destroy the economic feasibility of the project. As already pointed out, the rate of return for the projects will be "less than satisfactory". The sole hope for improvement rested upon the erroneous assumption that Applicants would have unused capacity with which to increase their revenues. An increase in producers' rates would therefore have to be accompanied by an increase in rates to Houston's customers. But in view of the retention of cancellation clauses in some of the contracts and the contractual provisions tying the price of gas to the price of Bunker "C" fuel oil, an increase in Houston's rates might be impossible or might result in loss of sales which would offset the increase.

On the other hand, if the producers' rates were found to be unlawfully high, they could be decreased by Respondent only for the future.

There is no provision in the Natural Gas Act authorizing Respondent to determine that a rate was unlawful in the past and, hence, there could be no recovery of past overpayments. Cf. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246 (1951).

In short, Respondent actually failed to determine the economic feasibility or the public convenience and necessity of the projects; and, by failing to determine the reasonableness and lawfulness of the producers' rates before issuing certificates to them and to Applicants, effectively stripped itself of authority adequately to deal with the situation if the producers' rates are in fact unlawful.

This Court, in an analogous situation, rejected Respondent's argument that it could defer consideration of the possibility of an increase in costs. In City of Pittsburgh v. Federal Power Commission, 99 U. S. App. D. C. 113, 237 F. 2d. 741, it was said, at p. 752:

> "If, as petitioners say, present conversion of Little Inch to petroleum products transportation means that future expansion of Texas Eastern's gas service will be costlier, that factor must be considered now. If, with Little Inch already abandoned, the Commission finds that expansion would serve the public convenience and necessity, it will not forbid such expansion merely because it would have been less costly with Little Inch still part of the system."

2. Sales to or by Florida Power. The contracts between Florida Power and its suppliers purport to be for direct sales of gas and thus beyond the regulatory jurisdiction of respondent (Opinion No. 301, R. 20414). Nevertheless, Sun Oil Company and Pure Oil Company, two suppliers, have expressly authorized sales of their gas for resale. Thus, Houston's arrangement with Florida Power permits Houston to curtail deliveries to Florida Power on peak days for the purpose of meeting Houston's firm resale demands. In that event, Houston will be reselling to its resale customers gas supplied by Sun and Pure and must reimburse Florida Power therefor. Houston may make up the curtailment if it has delivery capacity to do so and still meet the demands of its resale customers. If, as it may, Houston fails to deliver make-up gas to

Florida Power, Houston must pay Florida Power, in addition to the price paid by Florida Power to Sun and Pure, the difference between the delivered price of fuel received from Sun and Pure and the delivered price of the substitute fuel (R. 14517-14520). Sun and Pure have expressly agreed to this arrangement (R. 14530-14537). Houston is thus given the sole right to determine whether to deliver make-up gas or to pay for gas it takes from Sun and Pure for Florida Power's account.

Section 2(6) of the Natural Gas Act defines a natural gas company as:

> "A person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

And Section 7(c) of the Act forbids any natural gas company to engage in the sale of natural gas, subject to the jurisdiction of the Commission without a certificate of public convenience and necessity therefor.

If Houston exercises its option to pay for gas obtained from Sun and Pure the transaction will plainly constitute a sale of natural gas in interstate commerce for resale. The seller in that case will be the supplier or the power company or both. Yet neither of the suppliers nor Florida were required to, or did, apply for certification of such sales. Nevertheless, Respondent certificated Applicants' projects without determining whether certificates should be required for such sales to Houston (Order of February 21, 1957, R. 20906).

It may be argued that the determination need not be made unless and until Houston exercises its option to pay for such gas. But this argument overlooks the fact that Florida Power arranged to buy its gas directly from Sun and Pure so that all three could remain beyond Respondent's regulatory jurisdiction so far as these transactions are concerned. If the three companies or any of them came within Respondent's jurisdiction, would they adhere to their supply or purchase agreements? If they did not, a volume of business equal to 20% of Houston's total

capacity would be lost, for Houston's contract with Florida Power calls for daily transportation of 50,000 Mcf out of a total capacity of 250,000 Mcf (Opinion No. 301, R. 20420). Respondent actually took note of the possibility of loss of the power companies' business.

At p. 19, Opinion No. 301, (R. 20429), states:

> "We are aware of the suggestion which has been made that any material alteration in the gas transportation agreements could result in the power companies' exercising their right to terminate their contracts with Houston Gas."[6]

If Florida Power cancelled its contract the projects would have no economic feasibility whatever. It was therefore incumbent upon Respondent before granting the certificates to Applicants, to determine whether the arrangements brought Florida Power, Sun or Pure within its jurisdiction. City of Pittsburgh v. Federal Power Commission, supra. Instead, it put off that question until some future date, after construction of the projects, when the withdrawal of Florida Power, instead of merely defeating a plan for a project, would result in the waste of the many millions of dollars spent upon an actually built pipeline.

III. Respondent's failure to make findings with respect to the charge of unfair trade practices in violation of the anti-trust laws requires that the case be remanded.

Respondent certificates an unlawful project, one, moreover, whose economic feasibility the record shows to be at best highly dubious. This project will bring only a minimal amount of gas into the State of Florida. But it will do so on the basis of unfair and unlawful practices that threaten the economic life of Petitioner's dealer members.

Petitioner is an association of 119 fuel oil dealers, truck lines, marine transportation companies, terminal operators and allied

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[6] This was said in connection with the agreement tying the price of gas to the price of Bunker "C" Fuel oil. As pointed out above, the order of February 21, 1957 permitted the agreement to remain in effect.

businesses (R. 5040-5046, 5120).

The uncontroverted evidence shows that the fuel dealers' profit margin on Bunker "C" fuel oil is only 15 cents per barrel notwithstanding that the price has risen from $1.00 to $2.83 per barrel (R. 7824). Increases in cost of operation have been absorbed because of steady and substantial increases in volume (R. 7825). On the basis of current oil prices, the sales and transportation of gas by applicants would, during the first year of operation of the proposed pipe lines, deprive Florida fuel oil dealers and members of Petitioner of revenues as follows (R. 7842, 7844, 14593-14595).

Fuel	Revenues lost by Florida fuel oil dealers	Revenues lost by members of petitioner	Percentage loss of revenues by members of petitioner
Diesel or No. 2 oil	$ 7,250,135	$ 2,827,553	39.0%
Kerosene No. 1 oil	3,089,621	1,303,610	42.2%
Bunker "C" oil	29,625,790	15,672,043	52.9%
Total	$39,965,546	$19,813,206	49.7%

This reduction in volume of sales would necessarily increase the price of oil (R. 7824). Nevertheless, as against the overall fuel needs of the State of Florida, the volume of gas brought in would be meager (R. 7827). So that the overwhelming majority of fuel users, still dependent on oil, would be paying increased prices for their fuel, thanks to the inroads made by Applicants (R. 7827). And it should be noted that there is no shortage of oil to meet the needs of the State of Florida at a price lower than at any other place on the Atlantic seaboard (R. 7821-7822).

Petitioner's dealer members are thus threatened with loss of half their oil revenues, tantamount to economic destruction, on the basis of a scheme which the power company witnesses frankly admitted was

designed to keep the price of gas always below the price of Bunker "C" fuel oil, taking into account the greater efficiency of the latter (R. 6827, 7153-55, 7163-65). This is accomplished by the contractual arrangement whereby the price of the gas, originally fixed at less than the price of Bunker "C" fuel oil, will be increased or decreased 1 cent per Mcf respectively for every increase or decrease of 6.6 cents per barrel in the price of Bunker "C" fuel oil. It should be pointed out in this connection that, when Houston increased its transportation rate 2 cents per Mcf to the power companies, the total price to the power companies remained unchanged because the producers had reduced their prices by 2 cents per Mcf. Thus the relation between the price of gas and of Bunker "C", agreed upon by the parties, stayed fixed.

This sliding scale arrangement is one under which gas will be sold at prices wholly unrelated to cost. If the price of Bunker "C" goes down, even though the cost of the gas at the well head, or the cost of transportation, or both have risen, the price of the gas to the power companies will nevertheless go down. This scheme to undercut the sales of Petitioner's dealer members by selling gas at less than the price of oil, irrespective of the cost of the gas, violates both the letter and the spirit of the antitrust laws.

It is a contract in unreasonable restraint of trade, in violation of 15 U.S.C. 1. The power companies, their suppliers and Applicants constitute an illegal combination to monopolize or attempt to monopolize a part of trade or commerce to the exclusion of fuel oil dealers in violation of 15 U.S.C. 2. American Tobacco Co. v. United States, 147 F. 2d. 93 (6th Cir. 1944), affd. 328 U.S. 871). The agreement clearly contemplates sales at prices, however unreasonably low, for the admitted purpose of eliminating fuel oil competition, in violation of 15 U.S.C. 13a. Even if that purpose were not admitted, elimination of fuel oil competition is a necessary effect, and intent and purpose may therefore be inferred. United States v. Line Air Products Co., 83 F. Supp. 978 (N.D. Ill.,

1949). Finally, the agreement violates 15 U. S. C. 14, making it unlawful to contract to sell or fix a price on the condition, agreement or understanding that the purchaser will not deal in the commodities of a competitor. The agreements of the power companies embrace more than 50% of their fuel needs. Their contracts with their suppliers limit their rights to take less than the contract quantities and their contracts with Houston forbid them to exercise even those limited rights for a period of years. These clearly are agreements or understandings restricting dealings with members of Petitioner who would sell oil in competition with gas.

While Respondent is not charged with primary responsibility for enforcement of the antitrust and fair trade laws, it must nevertheless consider that important aspect of national policy in passing upon whether a project meets the requirements of public convenience and necessity. McLean Trucking Co. v. United States, 321 U. S. 67, 79 (1944); National Broadcasting Co. v. United States, 319 U. S. 190, 223 (1943); City of Pittsburgh v. Federal Power Commission, 237 F. 2d 741, 753 - 754 (D. C. Cir., 1956).

Respondent's failure to pass upon the antitrust issue constituted patent error. Contrary to the express requirement of Section 8(b) of the Administrative Procedure Act, 5 U. S. C. 1007(b), that all decisions include findings, conclusions and the reasons therefor, there is nothing from which the Court can judge whether the issue was even considered by Respondent, or, if it was, what was the basis for decision. The review function of the Court with respect to this important issue will be entirely frustrated unless the case is remanded to Respondent with instructions to consider the point and state its findings with respect thereto.

CONCLUSION

The procedural and substantive errors discussed above go to the vitals of the orders under review.

The intermediate decision procedure was omitted in its entirety upon grounds that are not supported in the record and that do not, in any event, measure up to the emergency which Congress prescribed as a condition for its omission. The case was then rushed through to decision in time far too short for adequate briefing and obviously too short for anything but the most cursory examination of the record by members of respondent. Indeed, respondent's answer to this charge was not to deny it but, in effect, to admit it by an equivocation, i.e., that the case received the consideration it would have received if dealt with on a routine basis.

Respondent's Opinion No. 301 certificated the projects upon a record which Respondent expressly found to be inadequate. The applications were shot through with infirmities which Respondent again expressly found would have required denial of the applications. But the certificates were granted subject to conditions to be fulfilled outside the record.

When Houston petitioned for elimination or modification of some of these conditions, Petitioner and other opposing intervenors were denied an opportunity to submit answers or to be heard in opposition to Houston's petition. Conditions were then eliminated or modified on the basis of documents filed and showings made entirely outside the record. And Petitioner was denied the right to petition for rehearing of the modification order.

Each of these deprived Petitioner of one of its rights. Each sharpened and magnified the effect of the other. Their cumulative effect was plainly to deny Petitioner and other opposing intervenors a fair hearing and thus to vitiate the orders under review.

Substantively, as already noted, the certificates were granted on an inadequate record, subject to conditions requiring correction of rates, contracts and arrangements that Respondent found to be unlawful but nevertheless permitted to remain in effect. Respondent granted

the certificates without passing upon questions that should have been decided before certification. For example, the lawfulness of the rates charged by Coastal's suppliers was left for future determination even though, if those rates turned out to be unlawful, the economic feasibility of the projects could well be destroyed.

Finally, Respondent made no finding with respect to, and, for all that appears from its orders, failed even to consider, Petitioner's claim that the agreements of the power companies with their gas suppliers and their arrangements with Houston constituted unfair competition in violation of the antitrust laws. A violation of the important national policy expressed in the antitrust laws, threatening the economic survival of many of Petitioner's members, was thus passed over in silence. Respondent thereby deprived the reviewing court of any basis for passing upon either the decision or the reasoning on this vital question.

For all these reasons, Respondent's orders are unlawful and should be set aside.

Respectfully submitted,

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APPENDIX

In addition to the portions of statutes and rules quoted in the Brief, the following portions of the Administrative Procedure Act and the Natural Gas Act are relevant:

Administrative Procedure Act:

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section ---

* * * * * *

(c) Evidence. -- Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7 --

(a) Action by Subordinates. -- In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and Decisions. -- Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative

decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Natural Gas Act:

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engage in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in

subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. Sec. 717f (c)]

* * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. Sec. 717f (e)]

JOINT BRIEF OF INTERVENORS, COASTAL TRANSMISSION CORPORATION AND HOUSTON TEXAS GAS AND OIL CORPORATION IN OPPOSITION TO THE PETITIONS FOR REVIEW.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 10 1957
Joseph W. Stewart
Clerk

Nos. 13,833, 13,952

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FLORIDA ECONOMIC ADVISORY COUNCIL,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

COASTAL TRANSMISSION CORPORATION, HOUSTON TEXAS GAS AND OIL CORPORATION, ET AL.,
Intervenors.

On Petitions for Review of Orders of the Federal Power Commission.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

In Intervenors' opinion, the questions presented are:

1. Was there substantial evidence to support the statutory findings of fact made by the Commission or was the Commission required to make certain specific findings which Petitioner urges are necessary therefor?

2. Did the conditions attached to the certificates "transform the projects into something wholly different from those applied for," and thereby deprive Petitioner of a fair hearing?

3. Did the Order of December 28, 1956, which issued the certificates with conditions attached, deprive Petitioner of a fair hearing because it did not provide for a hearing to be held on the matter of compliance with those conditions?

4. Were there undue preferences in certain of the rates proposed, or was there any "borrowing" of transportation gas for resale permitted and requiring further certification, in violation of the Natural Gas Act, or, do such claimed violations stem from Petitioner's misconception of the facts?

5. Did the Commission consider the evidence relied upon by Petitioner to support its charge of unfair competition; and was the Commission required to make a specific finding as to the "legal consequences" of such evidence?

6. Was Petitioner denied the right to a fair hearing by reason of the omission of the intermediate decision, the length of time permitted for briefing, the time involved in reaching the decision, or by the modification without hearing of the Order of December 28, 1956, and the rejection for filing of a Petition for Rehearing of the modifying Order?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,833, 13,952

FLORIDA ECONOMIC ADVISORY COUNCIL,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

COASTAL TRANSMISSION CORPORATION, HOUSTON TEXAS GAS AND OIL CORPORATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION AND FLORIDA DEVELOPMENT COMMISSION,
Intervenors.

BRIEF OF INTERVENORS, COASTAL TRANSMISSION CORPORATION AND HOUSTON TEXAS GAS AND OIL CORPORATION

COUNTERSTATEMENT OF THE CASE

On August 6, 1955, Houston Texas Gas and Oil Corporation (Houston) and on February 8, 1956, Coastal Transmission Corporation (Coastal), referred to jointly as "Applicants", filed interdependent applications under Section 7(c) of the Natural Gas Act[1] (Act) for certificates

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[1] Act of June 21, 1938 c. 556, 52 Stat. 821 U.S.C.A., Title 15 717r(b), as amended by Act of Feb. 7, 1942, c. 49, 56 Stat. 83, U.S.C.A., Title 15, 717f(c). In lieu of printing pertinent sections of the Natural Gas Act [52 Stat. 821-833 (1938); 15 U.S.C. 717-717w (1946)] amended February 7, 1942 [56 Stat. 83-84; 15 U.S.C. 717f (1946)] and July 25, 1947 [61 Stat. 459; 15 U.S.C. 717f(h) (1952)] Applicants understand that the Commission will furnish pamphlet copies of the Act for the convenience of the Court.

of public convenience and necessity to purchase, transport and sell, and to transport, from the fields of production in Texas and Louisiana to Florida, sufficient quantities of natural gas to provide for the first time the delivery of natural gas throughout Florida (R. 14661).

Houston and Coastal adopt the "Counterstatement of the Case" of the Federal Power Commission (Commission) as set forth in its Brief to this Court, with the following brief elaborations.

Coastal will purchase all of the gas for the projects which is for resale from producers in the fields of production in Texas and Louisiana (referred to herein as "Resale Gas") and will deliver and sell to Houston all of such Resale Gas. Houston will sell and deliver all of such Resale Gas to 34 retail gas distribution systems and 17 direct industrial customers in Florida. The remainder of the gas to be handled by the projects is natural gas of two Florida public utilities[2] (herein referred to collectively as "Power Companies"), which is being purchased by them direct from producers in the fields of production in Texas and Louisiana for their sole use and consumption, and not for resale (R. 5665-5666, 9868, 9871, 9893, 9896, 12417, 12421). This gas of the Power Companies (herein referred to as "Transportation Gas") will be transported by Coastal and Houston from Texas and Louisiana to Florida for redelivery to the Power Companies at their power plants for their own consumption.

The transportation service is firm, except if capacity of the pipeline is required to deliver additional Resale Gas to Houston's firm resale customers on any given peak day, the volume of Florida Power's Transportation Gas to be received and transported may be reduced (within limitations), and in this event, such additional Resale Gas is to be received into the pipeline and delivered to the resale customers (R. 14518-14519).[3]

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[2] Florida Power Corporation ("Florida Power") and Florida Power & Light Company ("Florida Power & Light").

[3] Details of this arrangement with Florida Power are discussed herein at pages 31 to 34.

On December 28, 1956, the Commission issued Opinion No. 301 and related Order granting the certificates of public convenience and necessity as applied for by Houston and Coastal but attached conditions requiring certain formal revisions of the tariffs and adjustment in the proposed rates. Applicants were also required, before putting them into effect, to submit plans of financing satisfactory to the Commission. The conditions attached are reproduced *in toto* in the Appendix to this Brief and are summarized as required by the argument herein.

The ensuing proceedings before the Commission are treated where pertinent, elsewhere in this Brief.

SUMMARY OF ARGUMENT

As Petitioner concedes that conditions may be attached to a certificate if the "statutory tests" have been met, its argument that the Commission was required to deny the applications of Houston and Coastal rather than issue certificates of public convenience and necessity with conditions attached, is but a challenge to the sufficiency of the evidence in support of the statutory findings of fact made by the Commission. The position of Petitioner that the basic findings of economic and financial feasibility cannot be sustained because the Commission did not make certain specific findings which Petitioner urges as necessary thereto is without merit.

Sufficient findings were made and there is substantial evidence to support all of the findings made by the Commission, both basic and ultimate. The Commission was not required to make specific findings of fact on the considerations which Petitioner urges as necessary, for those considerations are not made standards governing the issuance or denial of certificates.

The Order of December 28, 1956, which issued the certificates, did not deprive Petitioner of a fair hearing. The conditions did not "transform" the projects, as Petitioner asserts, and the projects certificated remain the same as those applied for. The attachment of the conditions was within the power of the Commission and their attachment

here was within the scope of the issues. Petitioner could and did anticipate that conditions might be attached, as shown by questions propounded during the hearing. Neither did that Order deprive Petitioner of a fair hearing on the ground that it did not provide for a hearing to be held on the matter of compliance with the conditions. There is no provision in the Act which grants Petitioner a right to a hearing thereon. The function of the Commission in the matter of compliance is administrative.

Certification of the projects was not "unlawful": (1) Petitioner fails to distinguish between rates payable by the Power Companies under filed rate schedules of Houston for transporting gas of the Power Companies, and the prices to be paid direct by the Power Companies to their gas suppliers. These prices in no way affect the transportation rates. It was the transportation rates that were the subject of the Commission's condition as to cost of service; (2) Petitioner misstates the transportation arrangement of Houston with Florida Power, which authorizes the receipt of less transportation gas to provide capacity for resale gas, and bases its argument on its misconception of the arrangements, *viz.* that Houston may "borrow" for resale such transportation gas.

Petitioner's complaint that the evidence it relied upon to support its charge of unfair competition was not considered is shown by the Opinion and Order to be without substance. It is clear from the Opinion and the condition concerning rates that the Commission did consider such evidence in its ultimate determination of the requirements of the public convenience and necessity. Petitioner's further complaint that the Commission did not make a specific finding as to the "legal consequences" of that evidence goes beyond its own admission that what the law requires is that the Commission *consider* the evidence. This having been done, Petitioner's complaints are without merit.

Petitioner was not denied a fair hearing by reason of the omission of the intermediate decision. Such action

was within the statutory powers of the Commission and did not constitute an abuse of discretion. The facts relied upon by the Commission fully justified the Commission's finding that the "due and timely" execution of its functions imperatively required the omission, and its consequent determination to omit the examiner's decision.

That Petitioner had three days less than it requested for briefing, i.e., nineteen instead of twenty-two, did not deprive it of a fair hearing, particularly since oral argument was granted and held after the twenty-second day. Nor did Petitioner assert any reason why it could not brief its case in nineteen rather than twenty-two days.

Petitioner's bare allegation that the Commission did not have sufficient time to consider the case cannot suffice to nullify the Commission's recitation of regularity. The detailed and exhaustive treatment reflected in the Opinion confirms that the case was fully considered.

Section 19(a) of the Act specifically authorizes the Comsion to modify an Order entered after a hearing "without further hearing". Petitioner's complaint that this was done is without merit, as is its further argument that the Commission, having modified or eliminated two minor conditions, denied it a fair hearing in rejecting for filing its petition for rehearing of the modifying order. That order did not effect any change in Petitioner's position from that established by the Order of December 28. Petitioner has no standing to complain for the conditions did not affect it.

ARGUMENT

I.

THE ULTIMATE FINDINGS MADE ARE SUPPORTED BY SUFFICIENT FINDINGS AND SUBSTANTIAL EVIDENCE. THE ACT DOES NOT REQUIRE ADDITIONAL FINDINGS, AS ASSERTED BY PETITIONER.

Petitioner argues repeatedly[4] in its brief that the Commission should have denied the applications of Houston and Coastal rather than to have issued certificates with conditions attached. But, since Petitioner concedes that con-

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[4] Pages (i), 7-8, 11, 12, 14, 23-30, 33-42, 46.

ditions may be attached to certificates when the "statutory tests of Section 7(e)" have been met (Pet. Br. p. 34), the question reduces itself to whether or not there is substantial evidence to support the ultimate findings of the Commission made in Opinion No. 301. Petitioner argues that the ultimate findings cannot be sustained because the Commission's basic findings as to economic and financial feasibility could not properly have been made. It challenges those two basic findings solely on the ground that the Commission did not make certain specific findings which Petitioner urges are necessary to support such basic findings. Petitioner's position, however, raises no question concerning the admission or rejection of any evidence. Nor does it question the existence in the record of the evidentiary facts recited in the Opinion upon which the Commission determined the basic findings, with one exception.[5] Record references to support the evidentiary facts stated in the Opinion are therefore unnecessary.

A. ESSENTIALS FOR THE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.

By Sec. 7(e) of the Act the Commission is required to make two ultimate findings of fact to support issuance of a certificate. That Section provides in this respect:

> "* * * a certificate shall be issued * * *
>
> (1) "* * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and
>
> (2) "* * * that the proposed service, sale, operation, construction * * * is or will be required by the present or future public convenience and necessity * * *"

In making these statutory or ultimate findings of fact, the Commission has long required proof of five basic

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[5] Petitioner asserts that the Commission's finding that "the load factor and return should continue to increase" was based upon the Commission's "illusion" that "applicants would have unused capacity at the outset" (Pet. Br., p. 36). Discussion of this contention is had at page 18, *infra*.

elements as support for five basic findings of fact: adequate gas supply, adequate markets, facilities reasonable as to cost and design, economic feasibility, and financial feasibility.[6]

The Commission carefully measured all of the evidence in this proceeding relating to these elements. It found that there was substantial evidence to support each essential element, and, having considered the evidence in all other material particulars, then made the statutory or ultimate findings of fact required by Section 7(e) of the Act.

The law is well settled that the findings of an administrative agency are conclusive if supported by substantial evidence.[7] Section 19(b) of the Act specifically so provides:

> " . . . The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

Section 10 of the Administrative Procedure Act[8] reiterates that findings shall be conclusive if supported by evidence on the record as a whole.

B. THE FINDINGS MADE ARE SUFFICIENT AND THE EVIDENCE IN SUPPORT THEREOF IS SUBSTANTIAL.

1. The Essential Elements for the Issuance of Certificates Were Established and the Commission Made All Requisite Basic Findings.

In Opinion No. 301, the Commission reiterated the elements essential to its issuance of certificates:

> "We are here called upon to determine whether or not Coastal and Houston Gas have shown that the

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[6] Petitioner does not question that these are the proper criteria (Pet. Br., p. 33).

[7] *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, (1950); *National Coal Association* v. *Federal Power Commission*, 89 App. D. C. 135, 191 F. 2d 462 (1951); *Cia Mexicana de Gas* v. *Federal Power Commission*, 167 F. 2d 804, 806, (C. C. A. 5, 1948); *Department of Conservation of The State of Louisiana* v. *Federal Power Commission*, 148 F. 2d 746 (C. C. A. 5, 1945); *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (C. C. A. 5, 1946); *Arkansas Louisiana Gas Company* v. *Federal Power Commission*, 113 F. 2d 281 (C. C. A. 5, 1940).

[8] Act of June 11, 1946, c. 324, 60 Stat. 243, § 10, U. S. C. A. Title 5, § 1009.

> authorizations they seek satisfy the requirements of public convenience and necessity embodied in Section 7(e) of the Act including such elements as an adequate gas supply, adequate markets, facilities which are reasonable and feasible from the standpoint of cost and design, reasonable and feasible financing, and the economic feasibility of the projects. On consideration of these various elements and from an evaluation of them in combination, giving to each its appropriate weight, we must determine whether in regard to the foregoing and other material particulars, applicants' proposals and the various aspects thereof are required by the public convenience and necessity."[9] (R. 20414).

An exhaustive and detailed consideration of the evidence satisfied the Commission that each essential element of the projects had been established by substantial evidence. The five basic findings made as to these elements are set forth in the Commission's Opinion No. 301 and accompanying Order of December 28, 1956, as follows:

(a) Gas Supply

> "Thus the record establishes and we find that there is available a supply of gas sufficient to support applicants' projects and to meet the demands of the markets they propose to serve." (R. 20417).

(b) Markets

> "The record establishes the existence in Florida both of a desire and need for natural gas, and of the existence of markets ready and waiting for all the volumes of gas applicants propose to transport and sell under their plan of operation. The public demand and need for gas were attested to by numerous state

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[9] Included among the "other material particulars" were such considerations as, that Florida possesses practically no usable native energy supplies; that it is almost entirely dependent upon imported petroleum products to meet its domestic, industrial and power-generating requirements; that such fuel is brought into Florida by tanker and barge, thus making Florida's economy vulnerable to interruptions; that such dependency upon a single source of fuel is undesirable from a competitive standpoint; and that, due to mild climatic conditions, a large part of the gas would be sold in direct competition with other fuels for use in generating electricity (R. 20415). Petitioner does not question the correctness of these findings before this Court.

and city officials as well as representatives of consumer interests and others. The existence of particular markets is demonstrated by the numerous service agreements and contracts entered into and by letters of intent to enter into such agreements. Clearly, there exists in the territory proposed to be served, customers who can reasonably be expected to take on the proposed service." (R. 20418).

(c) FACILITIES

"We conclude also that applicants' facilities as set forth in their respective applications are adequate to render the service proposed and meet the demands that may be placed on them, and that they are reasonable from the standpoint of costs." (R. 20421).

(d) ECONOMIC FEASIBILITY

"It is true that the record indicates that when the expected revenues of Coastal and Houston are applied to their rate bases, after deducting operating expenses and debt expenses, the return in each case for the first three years appears to be less than fair, but as the return appears to increase each year and as the demands of the markets may reasonably be expected to grow, the load factor and the return should continue to increase. We do not think that the conditions relating to the tariffs and financing plans which we shall hereafter attach to the issuance of these certificates will render applicants' projects less feasible economically—in fact, they may be expected to increase their revenues and hence the economic feasibility.[5]"

Foot note 5 reads:

"[5] We have in mind particularly the elimination of the cancellation and curtailment clauses in the transportation agreements between Houston Gas and Florida Power and Florida Power & Light, the requirement that the transportation service be rendered by both applicants on the basis of cost, and the provision in Coastal's tariff by which Coastal's service to Houston Gas will continue on a basis that will render the rate of return of both companies equal." (R. 20422).

* * *

"Also, the requirement of economic feasibility has been met under applicants' proposals and we consider

can be met under the conditions we shall hereinafter impose assuming that the certificates are accepted subject to those conditions." (R. 20423, 20424).

(e) FINANCIAL FEASIBILITY

"Important conditions will be necessary in connection with financing the projects of Coastal and Houston Gas. However [even][10] with these conditions, we believe that the projects can be financed." (R. 20433).

The essential elements of the projects having been established by substantial evidence, the foregoing basic findings of fact were properly made. The Commission, after considering all other material particulars, thereupon made, in its Order of December 28, 1956, the ultimate findings of fact required by Section 7(e) of the Act, as follows:

"(4) Applicants are able and willing properly to do the acts and to perform the service proposed by them, and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

"(5) The transportation and sale of natural gas by applicants, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and a certificate therefor should be issued as hereinafter ordered and conditioned." (R. 20438).

Petitioner does not question the correctness of the basic findings of gas supply, markets, or facilities. It challenges the basic findings of economic and financial feasibility solely on the ground that certain specific findings it urges as necessary to support those findings were not made.

The questions raised by Petitioner as to the basic findings of economic and financial feasibility have the effect of challenging these ultimate findings of the Commission.

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[10] The conditions required 15% equity and non-payment of dividends so long as interim notes were outstanding, instead of 12.4% equity and conversion or payment of the interim notes at the end of five years.

2. The Basic Findings of the Commission That the Projects Are Economically and Financially Feasible Are Supported by Substantial Evidence.

(a) Economic Feasibility

In support of this basic finding, the evidence established and the Commission found:

Coastal's third year revenues are expected to be $13,329,072 and its total operating expenses, depreciation and taxes are estimated to be $10,657,346. The balance of $2,671,726, when applied to the rate base of $49,590,925, produces a rate of return of 5.39 per cent (R. 14357, 20423). Its rate of return for the first and second years would be 4.48 and 5.34 per cent (R. 20423).

Houston's third year estimated revenues are $24,563,716 and its total operating expenses, depreciation and taxes are estimated to be $19,440,840. The balance of $5,122,876, when applied to the rate base of $86,135,512 produces a rate of return of 5.95 per cent. Its rate of return for the first and second years would be 4.48 per cent and 5.34 per cent (R. 14475, 14494, 20423).

Petitioner does not question the correctness of the foregoing evidentiary findings; its objection to the basic finding is that the Commission did not make certain other findings which Petitioner urges as necessary to support the basic finding. For convenience of argument, Petitioner's contentions are treated, *infra,* pages 13 to 20.

We submit that the foregoing evidence fully supports the Commission's basic finding that the projects are economically feasible.

(b) Financial Feasibility

In support of this basic finding, the evidence established and the Commission found:

Coastal's plan of financing called for a total of $54,589,000 to be raised as follows: $40,000,000 of First Mortgage Bonds (73.3% of total capitalization); $7,800,000 of Interim Notes (14.3%), and $6,789,000 of Common Stock (12.4%). (R. 14348, 14354, 20433).

Coastal's financing would be handled by Lehman Brothers and Allen and Company who were prepared to enter into an underwriting agreement to undertake the sale of the units of Common Stock and the Interim Notes (payable in preferred stock). Bonds would be sold privately to a group of insurance companies under an agreement to take down the proceeds on a pre-arranged schedule (R. 4581-4587, 13528-13533, 20433).

Houston's plan of financing for its pipeline called for a total of $95,522,500, to be raised as follows: $69,375,000 of First Mortgage Bonds (72.6% of total capitalization); $14,350,000 of Interim Notes (15.0%) (convertible to preferred stock); $11,797,500 of Common Stock (12.4%) (R. 5219-5222, 14480-14483, 14491-14493, 20434). Its plan of financing certain distribution systems (which are not subject to the jurisdiction of the Commission and which are not facilities to be certificated by the Commission) was necessarily indefinite because (i) some of the sellers of those systems retained the privilege of terminating their agreements to sell, (ii) it was doubtful that all of the funds necessary to purchase and expand those systems would be required at the outset, and (iii) Houston might cause the systems to be acquired and operated through another corporation (R. 7476-7477, 7489-7493, 20434). Nevertheless, the financial witness of Houston testified that funds for acquisition and expansion of the distribution systems could be obtained as follows: $17,000,000 of First Mortgage Bonds; $8,055,556 of Interim Notes; $6,444,444 of Common Stock (R. 7492-7493, 7495-7497, 7507, 20433).

Houston's financing would be handled by Blyth & Co., Inc., in accordance with the plan set forth above (R. 5216-5221, 20434). Houston expected to sell its bonds to a group of insurance companies at a rate in excess of 4½ per cent, in view of money market conditions, under firm contracts providing funds as construction required (R. 5228-5230, 20434).

Detailed schedules showing the plans of financing, estimated revenues and expenses, cash flow and projected

rates of return were received in evidence as to each Applicant (R. 14347-14357, 14444-14515).

Because of the indefiniteness above as to the total amount of funds, if any, to be raised by Houston in acquiring and expanding the distribution systems referred to, Houston was required to submit its complete plan of financing, for the pipeline and the distribution acquisitions, before putting it into effect (R. 20435). Coastal was also required to submit its plan (R. 20435).

The Commission noted that one financial witness testified that his project would be feasible under present market conditions with 15 per cent equity and that the other financial witness had expressed doubt if such increase in equity were required, unless some other changes in the plan were also made, because of present market conditions (R. 4586, 5873, 5881, 7501, 7502, 20435-20436). The Commission concluded that the projects "can be financed". (R. 20433).

Petitioner objects to this basic finding because "no satisfactory plan for financing was before Respondent when it certificated the projects on December 28, 1956" (Pet. Br. p. 35), claiming that without such finding the Commission could not find that "the financing of the projects was 'reasonable and feasible' " (Pet. Br. p. 35). This contention is treated *infra,* pages 13 to 16.

We submit that the foregoing evidence fully supports the Commission's basic finding that the projects were financially feasible.

C. THE COMMISSION WAS NOT REQUIRED TO MAKE CERTAIN SPECIFIC FINDINGS WHICH PETITIONER URGES AS NECESSARY TO SUSTAIN THE BASIC FINDINGS OF ECONOMIC AND FINANCIAL FEASIBILITY.

Petitioner's position that the Commission, as a matter of law, was required to deny the applications of Houston and Coastal rests upon its assertion that the statutory tests were not met (Pet. Br. pp. 33-34). Its argument is premised upon the erroneous assumption that the Commission was required to make specific findings (1) that the rate schedules of Houston and Coastal as proposed during

the hearing were satisfactory and that definite and firm plans of financing had been established (Pet. Br. pp. 34-36), (2) that the anticipated rates of return of Houston and Coastal were "fair" (Pet. Br. p. 36), and (3) that the rates of the producers who will sell gas to Coastal were "lawful" (Pet. Br. pp. 38-40), in order to support the Commission's basic findings of economic and financial feasibility.

Petitioner's position is without merit. None of these considerations upon which it seeks a specific finding is made a standard for the issuance or denial of a certificate. While it is incumbent upon the Commission to make sufficient findings of fact to enable the Court to determine whether there is substantial evidence to support the ultimate findings, particular "considerations [that] may well be part of the complex out of which the Commission's judgment as to the 'public convenience and necessity' arises" need not be considered as "separate and independent elements" and a specific finding of fact made thereon unless they are made "standards governing the issuance or denial of certificates". *National Coal Association* v. *Federal Power Commission, supra,* p. 467. This proposition is well established. *Federal Communications Commission* v. *Sanders Brothers Radio Station*; 309 U. S. 470 (1940); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 83 App. D. C. 297, 169 F. 2d 881 (1948); *Department of Conservation of State of Louisiana, et al.* v. *Federal Power Commission, supra.*

1. The Commission Is Not Required to Find That the Rate Schedules Proposed Are Satisfactory and That the Plans of Financing Are Definite and Firm.

This Court has rejected the argument that the Commission must find that proposed rate schedules of an applicant have been shown to be satisfactory, and that a definite and firm plan of financing has been established, to support basic findings of economic and financial feasibility. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission, supra.*

The facts in the *Panhandle* case and the action taken by the Commission therein are similar in many respects to the facts and the action taken herein. Michigan-Wisconsin Pipeline Company had applied for a certificate to construct a natural gas pipeline. During the hearings, it submitted proposed rate schedules and plans of financing. Although there was testimony as to its financing plan, Michigan-Wisconsin did not submit firm and definite proof of its ability to finance the project—among the reasons therefor being that its parent company was subject to the jurisdiction of the Securities and Exchange Commission.

As to the rate schedules submitted, the Commission found:

> "Nor are the rate structures which it has submitted satisfactory to the Commission." [11]

As to its plan of financing, the Commission found that applicant had not submitted firm and definite proof of its ability to finance and held that under the circumstances it was not necessary that applicant:

> "at this time submit firm proof of its ability to finance the proposed project." [12]

The Commission issued a certificate authorizing construction and operation of the pipeline and attached thereto substantial conditions. Respecting the rate schedules, the Commission required that there be submitted:

> "Within six months after issuance of this certificate a schedule of rates and charges in a form satisfactory to this Commission, providing for adequate and reasonable rates and charges consistent with the public interest." [13]

The Commission also attached a condition to the certificate that Michigan-Wisconsin obtain the approval of the

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[11] *In the Matter of Michigan-Wisconsin Pipeline Company*, 5 FPC 953, 954, 6 FPC 1, 20.

[12] 6 FPC 1, 24.

[13] 5 FPC 953, 955, 6 FPC 1, 20.

Securities and Exchange Commission of its plan of financing before putting it into effect.[14]

Panhandle Eastern Pipe Line Company, an opposing intervenor, appealed to this Court, arguing that, in the absence of specific findings that Michigan-Wisconsin had submitted satisfactory rate schedules and had submitted firm and definite proof that its project could be financed, the Commission's findings of economic and financial feasibility could not be sustained and that the Commission's ultimate finding that applicant is "able and willing properly to do the acts and to perform the services required" was not supported by substantial evidence. See Brief of Petitioners, pp. 41-47, in *Panhandle Eastern Pipeline Company* v. *Federal Power Commission,* No. 9588.

This Court, speaking through Judge Edgerton, rejected this argument, stating:

> "The Commission found that Michigan-Wisconsin is 'able and willing properly to do the acts and to perform the service proposed.' This finding, like that of public convenience and necessity, is expressly required by § 7(e) of the Act. We think it is also supported by substantial evidence. Panhandle says it is not supported by findings or proof of financial ability or a satisfactory rate schedule. The Act does not require such findings. The Commission did find, on sufficient evidence, that Michigan-Wisconsin 'has secured substantial reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its project' " (p. 883).

It is clear that neither a satisfactory rate schedule nor a firm and definite plan of financing is essential to sustain these findings of the Commission.

2. A Finding That the Rate of Return Is "Fair" Is Not Required.

Petitioner asserts that the finding of economic feasibility cannot be sustained because the Commission failed to find that the rates of return were "fair". It relies upon the Commission's finding that the rates of return

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[14] 5 FPC 953, 955, 6 FPC 1, 24.

"would be less than fair". Petitioner cites no authority to support its position, and for good reason: There is no requirement that the rate of return be "fair" for a project to be economically feasible. The Commission has found a project economically feasible where the evidence showed an initial return of approximately 2 per cent and a fifth year return of 5.33 per cent. *In the Matters of Algonquin Gas Transmission Company, et al.*, — F.P.C. —.[15] [Reported in Utilities Law Reports—Federal (CCH 1953), ¶ 9370, p. 10904, Report 126] There the Commission stated, at p. 10907:

> "The term 'economic feasibility' is a relative one. To demonstrate that a proposed project is economically feasible, it is not required that an applicant conclusively demonstrate that the proposed operations and sales will produce that rate of return which might be considered adequate, reasonable and nonconfiscatory in a rate proceeding initiated for the purpose of prescribing rates for a regulated company. Nor is a regulated company required to initiate rates designed to produce such a return. There is nothing in the Natural Gas Act or the Constitution which prevents a natural-gas company from initiating—or proposing—rates which would produce a rate of return less than that which might be fixed as reasonable under other circumstances. * * * "
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> " * * * if economic studies reflecting results of operations during the initial years of a proposed project indicate that the rates of return during that period will be less than adequate—but that the trend thereafter is such as to indicate the probability of a reasonable return in the succeeding years—then the project is economically feasible." [16]

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[15] Opinion No. 259 (Mimeo Copy) issued August 6, 1953.

[16] That the rate of return for new projects rarely is 6% is shown by the Commission's statement *In The Matter of Alabama-Tennessee Natural Gas Co.*, 11 FPC 75, at 78: "Although we use a 6% rate of return for purposes of this proceeding we feel compelled to observe that a 6% rate of return for a new company during its development period is quite liberal. Such a rate of return is usually commanded only by companies which have passed out of their development period."

Petitioner asserts that the Commission's finding that "as the demands of the markets may reasonably be expected to grow, the load factor and the rate should continue to increase" is erroneous, arguing that it is based upon an "illusion" that "Applicants' capacity would be 400,000 Mcf daily and that they would thus have unused capacity with which to supply increased demand." (Pet. Br., p. 36).

Petitioner paraphrases footnote 6 of the opinion (R. 20425). The full text of that footnote and the sentence to which it is noted show the fallacy of Petitioner's claim. The sentence reads: "Moreover, the record supports the conclusion that as applicants' service develops,[6] the proportionate part of its sales devoted to uses which more fully employ the distinctive potentials of natural gas will increase." Footnote 6 reads: "The facilities of Houston Gas were designed to transport a daily volume of 400,000 Mcf of gas *by the addition of more compressor facilities.* The market and gas supply situation offers the reasonable prospect of substantially increased future deliveries with a corresponding improvement in load and lowering of unit costs" (R. 20425). (Emphasis added.) It is clear that the Commission was basing this finding upon a redistribution of the estimated quantities between general firm service and direct service and upon future expansion of the systems by the addition of more compressors.

We submit that the Commission was not required to find that Houston and Coastal will earn a "fair" rate of return in order to find the projects economically feasible.

3. The Producers' Gas Rates are *Costs to* The Pipeline and the Commission in a Pipeline Certificate Proceeding Is Not Required to Make a Finding That They are "Lawful" by the Standards of Sections 4 and 5 of the Act.

Petitioner claims that the Commission's failure to determine the "lawfulness" of the rates of the producers will not permit the finding of economic feasibility to stand. Again, Petitioner cites no authority for its position.

In a pipeline certificate proceeding, gas suppliers'

rates are not *rates to be charged* by the pipeline but rather *prices to be paid* by the pipeline. They represent a cost to the pipeline and are to be appraised as a *cost*—not as a rate by the criteria of Sections 4 and 5[17] of the Act. The Commission found that Coastal's total operating expenses (which included the cost of gas) when combined with depreciation and taxes for its third year "are estimated to be $10,657,346". It then related this total cost to estimated revenues and concluded that "the requirement of economic feasibility has been met under applicants' proposals" (R. 20423). It is clear that the Commission examined the rates of the suppliers in the light of "all the circumstances" and concluded they were not unreasonable:

> "In any event, although the record in this case does not afford a basis for determining what the precise 'just and reasonable' rate is for the gas sold by the producers, *in view of all the circumstances in this case we cannot conclude that the public convenience and necessity requires that certificates should issue herein only if the rate at which the gas is sold is less than the prices proposed herein.* The matter of the producers rates is subject to our continuing supervision and control and if sufficient reason appears therefor, can be considered on the basis of a factual record developed in an appropriate proceeding under the Act" (R. 20436). (Emphasis added.)

Petitioner's claim that the Commission was required in this proceeding to engage in rate hearings involving 32 producers and 46 separate contracts and measure those rates in this initial pipeline proceeding by the standards of a rate proceeding, in order to determine the economic feasibility of a new pipeline project, is specious. Such a determination of producers' rates would have to be made in separate proceedings and in the light of their costs under actual operating conditions; in fact, the Regulations of the Commission prohibit the filing of a rate schedule by

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[17] Act of June 21, 1938, c. 556, 52 Stat. 823, U. S. C. A. Title 15, § 717 c, § 717 d.

a producer until shortly before the effective date of gas deliveries.[18]

The Commission found that the producers' rates were not unreasonable as elements of cost to the pipeline; it was not required to make a finding herein that such rates were "lawful" under the criteria of Sections 4 and 5 of the Act.

II.

THE ORDER OF DECEMBER 28, 1956 DID NOT DEPRIVE PETITIONER OF A FAIR HEARING MERELY BECAUSE OF THE ATTACHMENT OF CONDITIONS TO THE CERTIFICATES OR BECAUSE IT DID NOT PROVIDE FOR A HEARING TO BE HELD ON MATTER OF COMPLIANCE THEREWITH.

Petitioner claims that it was denied a fair hearing by the Order of December 28, 1956, on two grounds: (1) that the conditions transformed the projects into something "wholly different from those applied for and which were the subject of the hearing" and (2) that no provision was made therein for a hearing to be held on the matter of compliance with the conditions.

Petitioner does not challenge the power of the Commission to attach reasonable conditions to certificates. It could hardly do so in view of the express statutory power granted in Section 7(e) of the Act which reads:

> "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

and the cases which have sustained the Commission's exercise of this power.[19]

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[18] 18 CFR 154.92(b).

[19] *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C. A. 3, 1956); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467 (C. A. 3, 1956); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra; Skelly Oil Co.* v. *Phillips Petroleum Co.*, 174 F. 2d 89 (C. A. 10, 1949); *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494 (C. A. 3, 1953); *Arkansas-Louisiana Gas Company* v. *Federal Power Commission, supra.*

A. THE CONDITIONS DID NOT "TRANSFORM THE PROJECTS INTO SOMETHING WHOLLY DIFFERENT."

Examination of the conditions, which Petitioner does not set forth in its Brief, establishes that they did not "transform the projects into something wholly different from those applied for". The full text of the conditions is set forth in Appendix B of this Brief. The conditions applicable to Houston required that within 30 days Houston submit a revised FPC Gas Tariff containing rate schedules and executed service agreements under which (1) rates would be "commensurate with the cost of service determined on a reasonable allocation of costs between these services in accordance with the usual Commission standards and based on a rate of return not in excess of six percent"; (2) the cancellation provisions in the transportation agreements of Houston with the Power Companies would be eliminated; (3) the minimum bill provision in Houston's proposed rate schedule for general firm service would be modified to be based, at least in part, upon demand, and on a monthly rather than an annual basis; and (4) certain cancellation provisions in Houston's contracts for direct primary interruptible sales would be eliminated (R. 20439).

The conditions applicable to Coastal required that within 30 days Coastal file its Service Agreement with Houston in the form of a FPC Gas Tariff under which (1) charges by Coastal for services to Houston would be based on a cost of service formula; (2) the cost of service formula would provide separate charges (a) for gas sold by Coastal to Houston for resale and (b) for gas transportation service rendered to Houston and that such charges would be based on reasonable allocation of costs as between the two services in accordance with usual Commission standards; (3) its rate of return would be limited to not more than six per cent; (4) working capital would be credited with Federal Income Tax accruals in a specified manner; (5) provisions in its tariff as to possible future service would be eliminated; (6) a provision relating to possible future extraction by Coastal of heat content from gas purchased by

Coastal be eliminated or that it apply equally to gas produced by Coastal (R. 20439-20440).

Concerning the plans of financing, the conditions required that each Applicant increase its common equity from 12.4 per cent to 15 per cent and that no dividends on common stock be paid so long as the Interim Notes were outstanding (R. 20440).

The conditions dealt principally with formal features of the tariffs and plans of financing proposed by Houston and Coastal. They did not change or affect in any respect the facilities to be constructed or their location, the gas supply, markets, design, costs, or the volumes sold or the classification of services for which certificates were granted. The Commission, in its Order of February 21, 1957, effectively answered Petitioner's claim, as follows:

> "In any event, the plain fact is that the projects as certificated including conditions are not 'completely changed' nor are they 'new projects'. In a substantial preponderance of basic particulars, they are essentially the projects for which application was made. No change has been made in the sources of gas supply, the construction or route of the joint pipeline, the volumes of gas to be transported or the customers and markets to be served; nor is there changed the system of contractual relationships by which Coastal purchases approximately 100,000 Mcf per day from the producers, sells it to Houston Gas, which in turn sells it to the industrial and resale customers in Florida and by which Coastal and Houston Gas transport some 150,000 Mcf per day for the account of Florida Power & Light and Florida Power. The requirements that Coastal's rate of return be based on the over-all rate of return of the two companies for an indefinite rather than a limited period, that the rates of Houston Gas be commensurate with the cost of service, and that the cancellation provisions be eliminated from the transportation agreements, do not create a project so different that the requirements of law need be enlarged upon and the hearing transcript of some 8,000 pages be extended, particularly in view of the countervailing considerations of the public convenience and necessity set forth in our opinion. The same would apply to our requirements with respect to the capital ratios in

financing the project and the treatment of the interim notes, which by our order may remain outstanding as long as dividends are not paid on the common stock. As stated, these conditions are no more extensive, although perhaps more detailed, than those we have imposed in many cases'' (R. 20905).

It is clear that the certificates as granted were well within the permissible bounds approved by the Supreme Court in *Civil Aeronautics Board* v. *State Airlines,* 338 U. S. 572 (1950), by this Court in the *City of Dallas* v. *Civil Aeronautics Board,* 94 App. D. C. 175, 221 F. 2d 501 (1954), and by the Court of Appeals, 8th Circuit, in *Interstate Power Co.* v. *Federal Power Commission,* 236 F. 2d 372 (C. A. 8, 1956). In the latter case, the Court stated:

> "After noting the [various] zoning proposals advanced, * * * the Commission stated:
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> > 'After detailed consideration of the record, we have concluded that none of the zoning plans presented by the Proponents and the Staff or the modified plan which the Examiner finds most feasible are appropriate and acceptable . . . ' (p. 384).
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> "* * *
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> "The Petitioners contend that when the Commission decided to reject the several defined zones which were proposed and opposed on the hearing before the Trial Examiner, it should have given notice and held a hearing in respect to the particular zone lines which it contemplated establishing. They argue that they were denied due process in this respect.
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> "It cannot be denied that the course contended for would have been held appropriate if the Commission had followed it, but we do not find a denial of due process in the course that was followed. The Commission is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do

not possess.' Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 488, 71 S. Ct. 456, 465, 95 L. Ed. 456. It has been delegated by the Congress to administer the Natural Gas Act with power 'to draw inferences from [the facts].' Its 'function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment'. United States v. Detroit & Cleveland Navigation Co., 326 U. S. 236, 241, 66 S. Ct. 75, 77, 90 L. Ed. 38, and particularly its findings and directives need not be based directly on the expressed opinion of experts, but may be drawn from the facts. Market Street Ry Co. v. Railroad Commission, 324 U. S. 548, 559, 560, 65 S. Ct., 770, 89 L. Ed. 1171". (p. 385).

The cases relied upon by Petitioner do not support its claim that the conditions so transform the project as to require another hearing.

In *Public Utility District No. 1* v. *Federal Power Commission,* 242 F. 2d 672 (C. A. 9, 1957), the Court held only that the Commission had erroneously interpreted a document filed with it by a party to be a waiver of its rights to a hearing.

McClatchey Broadcasting Co. v. *Federal Communications Commission,* 99 App. D. C. 199, 239 F. 2d 19 (1956), cert. den. 353 U. S. 918, relied upon heavily by Petitioner, held that, where a permit to construct a television station had been granted after a comparative hearing of the qualifications of two applicants, based upon the respective proposals of those applicants, the unsuccessful applicant had a right to protest a subsequently filed motion to modify that permit, and to participate in the hearing thereon, when such modification amounted to a substantial change in the proposals upon which that party had been found more qualified than the unsuccessful applicant. The Court held that such modifications in the basic facilities authorized by the permit granted would be tantamount to the issuance of a new and different permit from that which, as a result of a comparison of the proposals of the two applicants, had been found to better serve the public convenience and necessity.

W. S. Butterfield Theatres v. *Federal Communications Commission,* 99 App. D. C. 71, 237 F. 2d 552 (1956), and *Enterprise Co.* v. *Federal Communications Commission,* 97 App. D. C. 374, 231 F. 2d 708 (1955), which also involved comparative hearings, were decided upon the same principle as the *McClatchey* case, *supra,* and are in accord therewith.

In *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63 (1935) the Supreme Court held that a fair hearing was denied the petitioner, a company whose rates were the subject of investigation, where the Public Utilities Commission of Ohio had arbitrarily reduced a certain cost item and had also materially changed allocation of distributing costs without any evidence in the record in support of such reduction or change.

The foregoing cases are readily distinguishable from the instant case. Three involved comparative hearings. The successful applicant in each, *after* being granted a permit following a comparative hearing, sought to or did effect substantial adverse changes in the very qualifications which motivated the agency in making the award, thereby removing the basis upon which the agency had determined that applicant the more qualified. One involved a complete failure to hold a hearing to which the intervenor was entitled by statute, and the final case involved an order for which there was no supporting evidence, and which, in fact, was in conflict with the evidence presented.

In the instant case, the statutory hearing was held and Petitioner participated fully therein; the findings of the Commission were based upon and in accord with the evidence adduced therein; and the changes required to be made in the tariffs and financing plans were directed to be made as a result of and on the basis of the evidence adduced at that hearing. The certificates granted were not "new or different permits"; they were *the* certificates issued as a result of and in conformity with the evidence in the hearings on the applications.

B. PETITIONER COULD AND DID ANTICIPATE THE CONDITIONS ATTACHED.

Petitioner's position that the changes effected in the projects "could not be and were not anticipated" (Pet. Br. p. 29) is refuted by the record.

The rate witness presented by Petitioner compared the rates proposed by Houston with the average cost of service he computed, based on his own assumptions, but using cost of service and allocation practices of the Commission, and pointed out that the proposed transportation rate was not commensurate with its cost of service (R. 7663, 7701-7702).

The Commission's Order required that Coastal's charges be made on a cost of service basis with charges for the transportation service set out separately from other services, and that Houston's rates be commensurate with its cost of service allocated according to the practices of the Commission (R. 20439).

The elimination of the cancellation clauses from the transportation agreements was forecast by cross-examination of witnesses for both the Power Companies (R. 6774-6776, 7227-7229).

Counsel for Petitioner cross-examined Mr. W. J. Bowen, President of Coastal, as to the acceptability of possible limitations on rate of return, and changes as to conversion of the Interim Notes (R. 6492-6494). Both of these conditions found their way, in effect, into the Commission's Order (R. 20439-20440).

The cross-examination of counsel for Petitioner, the Commission Staff and others probed other areas and pointed up the very conditions which were imposed, including the requirement of 15 per cent equity (R. 7501), the formal tariff requirements (R. 7394-7398), the elimination of the hydrocarbon extraction and gas in place provisions from the Houston-Coastal agreement (R. 6542-6546, 6547) and the crediting of Coastal's working capital with income tax accruals (R. 6549).

The Petitioner not only anticipated but pointed up the very conditions attached.

C. THE ORDER OF DECEMBER 28, 1956, ISSUING CERTIFICATES WITH CONDITIONS ATTACHED, DID NOT DEPRIVE PETITIONER OF A FAIR HEARING MERELY BECAUSE THAT ORDER DID NOT PROVIDE FOR A HEARING ON THE MATTER OF COMPLIANCE WITH THE CONDITIONS.

In its Statement of Points and again in its Summary of Argument, Petitioner states that it was denied its "statutory right to a fair hearing" because "Respondent granted them [the certificates] subject to a number of major conditions, compliance with which was to take place in the future without further hearing" (Pet. Br., pp. 7, 11).

In its Argument, Petitioner does nothing more than reiterate its proposition.

Petitioner must first establish that it has a statutory[20] right to a hearing. Yet Petitioner cites no requirement of the Act that a hearing must be held on a matter of compliance, nor that an intervenor, who has participated in hearings which result in the issuance of certificates, must be permitted to be heard thereon. A review of the Act clearly shows that when a hearing is to be held, either mandatory or permissive, it was spelled out by the Congress.[21] Had Congress intended that a hearing be held on compliance with conditions, it would have so provided.

Petitioner relies solely on three cases (Pet. Br., p. 30), none of which remotely stands for its proposition.

In *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292 (1937), and *United States* v. *Baltimore & O. S. W. R. Co.,* 226 U.S. 14 (1912), the petitioners therein admittedly had a statutory right to a hearing for the purpose of determining the very issues which were resolved by the orders in question. The cases held that the right to

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[20] Petitioner does not and cannot claim that it is entitled to a hearing on the matter of compliance as a matter of due process of law; its rights of intervention are solely statutory. *F.C.C.* v. *Sanders Brothers Radio Station, supra; Associated Industries, Inc.* v. *Ickes,* 134 F. 2d 694 (C. A. 2, 1943); *National Coal Association* v. *Federal Power Commission, supra.*

[21] See, for example, Section 3, Exportation or Importation of Natural Gas; Section 4(e), Suspension of New Rates; Section 5(a), Fixing of Rates and Charges; Section 7(a), Extension of Facilities; Section 7(b), Abandonment of Service; Section 7(c), Construction and Extension of Facilities; Section 7(f), Determination of Service Areas; Section 9(a), Rates of Depreciation; and Section 14(b), Adequacy of Gas Reserves.

a hearing requires that the issues be determined upon the evidence adduced at that hearing, rather than upon information gained *dehors* the record.

In *Saltzman* v. *Stromberg-Carlson Telephone Mfg. Co.*, 60 App. D. C. 31, 46 F. 2d 612 (1931), the Court held that, under the statutory provisions of the Federal Radio Act a hearing was required to be held *before* the Commission could change the frequency of a radio station, and that the Commission's order changing the frequency and providing for a hearing subsequent thereto was void as being in conflict with the express provisions of that statute.

Petitioner's right to participate in the Section 7(c) proceeding here is granted by Section 15 of the Act. That hearing was held, the Commission made the requisite statutory findings from the evidence adduced, and issued certificates. The hearing contemplated by Section 7(c) was thereupon concluded.

Acts performed in compliance with conditions attached to certificates, like other acts performed pursuant to certificates, are in furtherance of (rather than elements for determining) the requirements of public convenience and necessity. These requirements were determined by the Commission from the evidence received during the hearing. The Commission attached the conditions to the certificates to assure fulfillment of these requirements. The matter of compliance with the conditions is one wholly within the administrative powers and competence of the Commission. There is no requirement, statutory or other, that a public hearing be had.

Additionally, Petitioner has no standing to complain of the attachment of the conditions, for it would be aggrieved, if at all, by the grant of the certificates rather than by the conditions imposed. *Arkansas-Louisiana Gas Co.* v. *Federal Power Commission, supra. A fortiori* Petitioner has no standing to complain of the manner of compliance with the conditions nor to demand a hearing thereon. Cf. *Alston Coal Co.* v. *Federal Power Commission,* 137 F. 2d 740 (C.C.A. 10, 1943).

III.

THE PROJECTS PROPOSED AND CERTIFICATED DO NOT VIOLATE THE NATURAL GAS ACT, NOR IS THE COMMISSION'S CERTIFICATION THEREOF UNLAWFUL, AS CLAIMED BY PETITIONER.

A. PETITIONER'S CHARGE THAT THE PROJECTS PROPOSED AND CERTIFICATED VIOLATE THE ACT BECAUSE THERE IS UNDUE PREFERENCE IN RATES IS BASED UPON ERRONEOUS FACTS AND MISCONCEPTION OF THE LAW.

Petitioner's argument that the projects proposed and certificated violate the Act centers about the price adjustment clause in the gas purchase contracts between the Power Companies and the producers who sell the Transportation Gas to them. This argument is bottomed upon two assumptions: (1) that the Commission *found* the *price adjustment clause* "resulted in and would continue to result in unequal distribution of the cost of service so that each class of service would not bear its proper share" (Pet. Br., p. 37), resulting in an undue preference under Sec. 4(b) of the Act, and (2) that the gas purchase contracts between the Power Companies and their suppliers, which contain the price adjustment clause, are tariffs permitting rate fluctuations, contra to Sec. 154.38(d) of the Commission's Regulations.[22] *Both of these assumptions are at variance with the facts and the law.*

Petitioner fails to distinguish between the gas purchase contracts between the Power Companies and certain producers whereunder gas is *sold to* the Power Companies direct, and the gas transportation rate schedules of Houston with the Power Companies whereunder that gas is *transported for* the Power Companies by Houston. It is only the price paid by the Power Companies direct to their suppliers for gas in the field that fluctuates. There is no fluctuation of the transportation rate, which is the subject of regulation by the Commission. The transportation rate schedules never have and do not now contain any fluctuating rate. The Commission did *not* find that the price adjustment clause in the gas purchase contracts "resulted and would continue to result in an unequal distribution of the

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[22] 18 CFR 154.38(d).

cost of service so each class of service would not bear its proper share." The Commission *did* find that the *transportation rate* to be charged by Houston as originally proposed did not bear its full share of the cost of service, but was "designed to enable the sale of gas at competitive prices [with oil]" (R. 20427), and did not give "due or appropriate regard to the various factors which are material and should be considered in fixing proper rates for such service" (R. 20425).

It was because of these defects that the Commission attached its condition which required that Houston's rates for all services "shall be commensurate with the cost of service determined on a reasonable allocation of costs between these services in accordance with usual Commission standards" (R. 20439, 20429), thereby causing to be eliminated any preference in Houston's rates.[23]

At no time, however, did the Commission attach any condition which required the elimination of the *price adjustment clauses* in the gas purchase contracts as Petitioner flatly states in its Brief at page 31, intimates at page 8 thereof, and assumes in its argument on this point.

Petitioner's second assumption is equally fallacious. The tariffs required to be filed herein under Section 154.38 (d)(3)[24] of the Commission's Regulations are those of Houston and Coastal. Petitioner does not claim that these tariffs violate the Regulations. Petitioner bases its charge of violation of the Regulations solely on the *price adjustment clause* in the gas purchase contracts, yet those contracts are not required to be filed with the Commission under the regulation cited or any other. The prices to be paid by the Power Companies direct to the producers are not subject to the jurisdiction of the Commission.

Petitioner says that, as originally proposed, the transportation rate did not bear its cost of service and was less than the rate for another class of service, *i.e.*, the preferred interruptible, which it denominates as an "inferior service". In a certificate case, rates cannot be fixed

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[23] See related points at pages 34-36.

[24] 18 CFR 154.38(d)(3).

with the exactitude required in a rate case.[25] Undue preferences and unreasonable differences in rates are peculiarly within the province of a rate case. In this case the Commission's order issuing the certificates merely required that Houston file revised rate schedules with rates which would be based upon and commensurate with cost of service allocated in accordance with usual Commission practices. Petitioner admits (Pet. Br., p. 38) that the transportation rates filed in compliance with the condition were raised to equal the transportation cost of service. Acceptance by the Commission of the revised rate schedules filed as constituting satisfactory compliance with its condition makes it clear that the Commission is now satisfied that no undue preference can now be said to exist as between classes of service. Furthermore, the Commission has expressly retained continuing jurisdiction over these rates. Petitioner's contention that the project violates Section 4(b) of the Act is therefore unfounded.

B. THE COMMISSION'S CERTIFICATION OF THE PROJECTS IS NOT "UNLAWFUL".

Petitioner's first reason for asserting that the certification was "unlawful" i.e., that the Commission did not determine the lawfulness of prices to be paid the producers for direct purchase gas and that, therefore, the Commission's finding of economic feasibility could not properly have been made, has been treated, *supra,* pp. 18-20.

Petitioner's second reason for asserting that the certification was "unlawful" is based upon Petitioner's incorrect statement that, if additional capacity of the pipeline is required for firm resale service

> "* * * *Houston would sell Florida Power's gas* and either deliver make-up gas to Florida Power at a later date, or, if the capacity were needed for firm resale service, *Houston could pay Florida for its gas taken by Houston for resale.* And *Houston would be the sole one to determine* whether to do the one or the

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[25] Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 83 App. D. C. 279, 169 F. 2d 881 (1948).

other (R. 14507-14520)"[26] (Pet. Br., pp. 3-4). (Emphasis added.)

Petitioner then concludes that a resale of Florida Power's gas would thereby result, requiring additional certification.

Petitioner's claim results from either its failure or unwillingness to understand the transportation arrangements of Houston with Florida Power. It is, therefore, necessary that the pertinent facts of the arrangement be set forth correctly.

Houston will transport for Florida Power daily from 45,000 to 55,000 Mcf of gas of Florida Power. Florida Power is to schedule in advance the daily quantity of its gas which Houston is to receive (or cause to be received) into the pipeline in Louisiana, and Houston is to redeliver to Florida Power at its power plants in Florida such scheduled daily quantity of gas (R. 9835-9836). Florida Power is purchasing its gas in the fields of production in Louisiana direct from the producers (Sun and Pure) under 20-year contracts, for its own use and consumption in its power plants and not for resale (R. 9871, 9896).

Until such time as the delivery capacity of the pipeline is increased, and

> "* * * to the extent that the capacity of Houston's pipeline is required to deliver to Houston's firm resale customers on any given day resale natural gas of Houston * * *, Houston is authorized to reduce Florida's [Florida Power's] scheduled daily delivery * * * [into the pipeline] on such day; provided that any such reduction shall not exceed 30,000 Mcf below Florida's minimum daily contract quantity on such day * * * During any day on which Florida's scheduled daily delivery of gas [into the pipeline] is so reduced, Florida's scheduled daily delivery of such gas

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[26] Equally incorrect, and misleading to the Court, are the statements of fact and argument, at pages 41-42 of Petitioner's Brief, to the effect that the transportation business could be lost through "* * * the power companies' exercising their right to terminate their contracts with Houston Gas" for the cancellation provisions referred to have been eliminated from the transportation contracts.

on such day, from Houston to Florida, shall also be reduced by a like amount'' (R. 14518-14519, para. No. (1)). (Words in brackets added for clarity.)

If the transportation service is thus curtailed, Houston is to transport for Florida Power, subject to its having capacity therefor and in addition to the regularly scheduled gas of Florida Power, the gas for which Florida Power may have, pursuant to the ''take-or-pay'' provisions of its gas purchase contracts, been required to prepay its suppliers —called ''make-up gas''—but which it is entitled to receive. If, during the succeeding eleven months, Houston is unable to transport some part of such ''make-up gas'', Houston is to reimburse Florida Power for its out-of-pocket cost directly attributable thereto, to-wit, (i) for Florida Power's prepayment, if any, to its suppliers for the ''make-up gas'' not so transported for it during the eleven months, and (ii) the difference, if any, in Florida Power's cost of fuel used by it in lieu of its gas not so made up (R. 14519).[27]

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[27] These provisions read:

''(2) If, in any month during which any such reduction by Houston occurs, Florida is required to pay Sun and Pure, under the Gas Purchase Contracts, or either of them, for gas not delivered as the result of such reductions, then and in that event, as soon as Houston's operations permit, Florida shall be entitled to receive and agrees to take, to the extent permitted by its operations, delivery from Houston, of all gas (attributable to such reduction) so paid for but not received (''make-up'' gas), during the following eleven (11) months, by taking gas from Sun and Pure in excess of Florida's regularly scheduled daily delivery under its Natural Gas Transportation Agreement, and Houston agrees, subject only to Houston having pipeline delivery capacity therefor and to Houston's ability to meet said demands of Houston's firm resale customers as set forth above in this letter, to deliver said make-up gas to Florida.

''(3) If Houston fails (unless as a result of force majeure or physical impairment beyond the control of Florida or Houston) to deliver to Florida all of such make-up gas (so paid for but not received in any given month) during any succeeding eleven (11) months' period, Houston shall (i) reimburse Florida for that portion of such make-up gas so paid for by Florida but not so made up by Houston to Florida during such succeeding eleven (11) months, and (ii) reimburse Florida for the difference between Florida's delivered cost of any fuel, as used in Florida's power plants in lieu of such gas so paid for by Florida but not so made

The receipt into the pipeline of any of Florida Power's separate gas supply, other than for transportation to and use by Florida Power is neither contemplated nor permitted.

Houston may not "borrow" Florida Power's gas for resale. Nor does it have an "option" to take or pay for this Transportation Gas of Florida Power, as asserted by Petitioner, for Houston is only a transporter thereof for hire, pursuant to Section 1(b) of the Act.[28] Reduction in the volume of Transportation Gas taken into the pipeline will simply provide capacity for Resale Gas, which will be taken into the pipeline for delivery to Houston's firm resale customers.

The transportation agreement with Florida Power has been filed with and accepted by the Commission as Houston's special Rate Schedule T-1 (R. 20532, 20534-20570), and the parties thereto expressly recognize the continuing jurisdiction of the Commission over the transportation service (R. 20557 paras. 19, 20).

The Commission has carefully examined into the extent of its jurisdiction, as well as the activities requiring certification. No further authorizations are required.

IV.

THE OPINION AND ORDER ESTABLISH THAT THE FACTS RELIED UPON BY PETITIONER TO SUPPORT ITS CHARGE OF UNFAIR COMPETITION WERE CONSIDERED. THE COMMISSION IS NOT REQUIRED TO MAKE A SPECIFIC FINDING AS TO THE LEGAL CONSEQUENCES OF THOSE FACTS.

Petitioner's allegation of error with respect to its charges of unfair competition is difficult to follow and appears to be inconsistent. In the heading of that section (Pet. Br., p. 42), Petitioner claims error by the Commis-

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up by Houston during such eleven (11) months (as reflected on Florida's books), and what Florida's delivered cost of such gas so paid for but not received would have been, if such gas (so paid for by Florida but not made up) had been delivered by Houston to Florida for use in such power plants."

[28] Act of June 21, 1938, c. 556, 52 Stat. 821, Sec. 1 (b).

sion for its "failure to make findings with respect to the charge of unfair trade practices in violation of the anti-trust laws". However, on page 45 of its Brief, Petitioner appears to concede that such findings are not required: "While Respondent is not charged with primary responsibility for enforcement of the anti-trust and fair trade laws, it must nevertheless *consider* that important aspect of national policy in passing upon whether a project meets the requirements of public convenience and necessity." (Emphasis added.) Petitioner concludes that section by requesting that the case be remanded for the Commission to "consider the point and state its findings with respect thereto" (Pet. Br., p. 45).

If Petitioner contends only that the Commission is required to *consider* evidence relating to its charge of unfair competition, we agree with its conception of the law, and submit that Opinion and Order 301 clearly establish that the evidence Petitioner relied upon was considered and weighed by the Commission in making its ultimate decision as to the requirements of the public convenience and necessity.

Convincing evidence that the Commission did consider Petitioner's argument on this point as presented to the Commission on Brief by Petitioner is the fact that the Commission attached one of its conditions to the Order of December 28 to meet and obviate Petitioner's objection. On page 23 of its Brief to the Commission, Petitioner's argument was that as the "transportation rates are below the cost of rendering the transportation service", the "effect of the price adjustment clauses in the Gas Purchase Contracts between power companies and their suppliers, *coupled with the transportation rates in their contracts with Houston,* is to price gas to them at their plants at less than" the price of oil (emphasis added). This argument was adopted by Petitioner by reference (R. 20753-20754) in its Petition for Rehearing of the Order of December 28. Here, however, Petitioner attempts to advance its argument on a different basis, claiming that the *price adjustment clauses* in the gas purchase contracts

between the power companies and their suppliers *alone* constitute unfair competition. The obvious reason for Petitioner's shift in position is that the Commission, by its condition requiring Houston's transportation rates to be commensurate with cost of service, removed the very ground upon which Petitioner had formerly relied to support its charge of unfair competition—that the transportation rates were below cost. That Petitioner has not now abandoned its claim of unfair competition, but, rather, has presented it to this Court on a different ground, establishes Petitioner's determination to keep this claim alive regardless of the facts upon which it has to rely.

The Opinion further shows that the evidence relied upon by Petitioner[29] and its arguments thereon were considered. With Petitioner's evidence and arguments on Brief before it, it is manifest that the Commission considered both the evidence and the arguments in appraising the effect of the projects upon the interests of competitors. It found that the economic loss to competitors would be temporary and was outweighed by the interests of the people of Florida. In its Opinion, the Commission time and again takes cognizance of the economic interests of fuel competitors and the general effect, competitive and otherwise, of the introduction of natural gas in light of the public convenience and necessity:

> "* * * it [Florida] is almost entirely dependent on imported energy to meet its domestic, industrial and

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[29] It should be noted that the evidence of what Petitioner called "disastrous" economic loss to its members (Pet. Br., p. 4) from "unfair competition" is valueless. Petitioner's proof of gross fuel oil sales was based on a survey which included only an unidentified portion of Petitioner's membership (R. 7828, 14593-14595); its purported 49.7 per cent loss of fuel oil revenue (Pet. Br., p. 43) was unrelated either to Houston's markets or to the total gross revenues of Petitioner's members; and Petitioner's witness testified that he could not estimate the loss of net revenues to Petitioner's members, but was presenting gross revenue figures only: "No, I can not estimate loss in profits, because our membership is made up of everyone from the little kerosene peddler who has a margin of anywhere up to five or six cents per gallon; from that to the large oil company whose profits on Bunker-"C" sales may be as low as two or three cents per barrel" (R. 7844). See this Court's Opinion in *Charleston & W. C. Ry.* v. *Federal Power Commission*, 98 App. D. C. 241; 234 F. 2d 62, 64 (1956).

power generating requirements. Florida's dependency on imports consisting chiefly of petroleum products brought in by tanker and barge make its economy vulnerable to interruptions of this single source of supply and is moreover undesirable from the competitive standpoint" (R. 20415).

* * * *

"Thus a large part of the Florida market would appear to consist of sales in direct competition with other fuels to power companies and others for use in generating electricity" (R. 20415).

* * * *

"It [Florida] is obviously at a disadvantage, both competitively and otherwise, by its dependency upon petroleum products, a single source of fuel. The introduction of natural gas, in addition to making available to consumers in Florida the usual benefits of natural gas of cleanliness, convenience and economy, would provide a second source of fuel to help forestall any possible emergency shortage, would give rise to greater fuel competition in the state with its attendant public advantages, would aid in the economic development of the state by stimulating industry and otherwise, and would help meet the growing fuel demands of the burgeoning Florida population." (R. 20418).

The Commission makes definitive findings respecting economic losses of competitors in view of the public interest:

"Nor do the interests of competitors compel us to deny the certificates here . . . [Though they] may initially suffer economic losses, it reasonably appears that increased industrial and other activity in Florida resulting from the introduction of natural gas will yield offsetting benefits in the long run. We, therefore, conclude that the need and desire of the public in Florida for natural gas turns the scales against these competing interests" (R. 20437).

These findings reflect the testimony of Petitioner's witness that the decline of fuel oil sales would be temporary and that they would increase in the future "based on possible future industrial growth of the state" (R. 7826, 7824).

It is clear that the Commission considered the effect of the facts relied upon by Petitioner in support of its charge of "unfair competition" as bearing upon the question of whether the certificates are required by the public convenience and necessity. It is not imperative that the Commission "label" its consideration of the facts and arguments of Petitioner, so long as it is evident that it did consider them. In the case of *Luckenbach Steamship Co., Inc.* v. *United States,* 122 F. Supp. 824 (D. C., S. D. N. Y., 1954), similar allegations of unfair competition had been made by the petitioner therein to the Interstate Commerce Commission. Judge A. Hand, speaking for a statutory three-judge court, rejected the petitioner's contention that its charge of unfair competition had not been considered by the Commission:

> "The charge of unfair competition also seems clearly to have been considered by the Commission. The report notes that Isbrandtsen is at present engaged exclusively in unregulated foreign trade and that the fulfillment of the regular fortnightly service would be carried out by its ships as part of their round the world route. Isbrandtsen's certificate was sharply limited as to ports to be served, commodities to be transported, and time during the year when service could be rendered. Thus it is clear that the Commission weighed the need for the services against the possibility of unfair competition and found that with the limitations of the certificate and the close regulation which accompanies the receipt of such approval, the public convenience and necessity would be served by permitting the proposed service." pp. 828-829.

This case quite properly did not require specific discussion of the charge of unfair competition in so many words.

As noted at the outset, Petitioner appears to go further than its own statement of what the law is: It would require that the Commission make specific findings as to the *legal consequences* of the facts relied upon. In its Petition for Rehearing, Specification of Error No. 23 (R. 20741), and in its Petition for Review, Ground No. 24 (p. 7), Petitioner alleges error for the failure to find that the facts it

relied upon "constitute unfair competition in violation [of law and][30] of the public policy of the United States [as expressed in the legislation of the Congress of the United States]".[31] A specific finding on such issue is not required.[32]

Whether or not there is unfair competition in violation of the anti-trust laws is not made a standard governing the issuance or denial of certificates under the Act. As it is not, a specific finding thereon is unnecessary. *National Coal Association* v. *Federal Power Commission, supra; Federal Communications Commission* v. *Sanders Brothers Radio Station, supra; Department of Conservation of State of Louisiana, et al.* v. *Federal Power Commission, supra; Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra.* As Petitioner appears to concede, the law is that an administrative agency has no authority to enforce federal statutes having to do with anti-trust and unfair competition, but, in matters of policy within the ambit of the powers of the agency, it should consider facts presented concerning purported violations of such statutes or any other broad federal policies, and weigh them into the requirements of the public convenience and necessity. *National Broadcasting Company* v. *United States,* 319 U. S. 190 (1943); *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944); *City of Pittsburgh* v. *Federal Power Commission,* 99 App. D. C. 113, 237 F. 2d 741 (1956). This the Commission did.

In the *City of Pittsburgh* case, this Court reversed the Commission because the Commission had refused to permit

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30 Petition for Review only.

31 Petition for Rehearing only.

32 It is to be observed that Petitioner in its specification of error No. 23 admits consideration by the Commission of the facts upon which its charges were based:

> "23. The Commission found that the matter of "primary concern" to the power companies "is that the transportation charge remain sufficiently low to enable them to utilize natural-gas service at a cost lower than that for oil service" and that they are "regulated utilities and have an obligation to limit their costs as vigorously as possible." Op. 301, p. 19.

the introduction of testimony which bore upon possible violation of anti-trust statutes. The Court directed that the Commission admit the evidence and *consider* it in its determination of the requirements of public convenience and necessity; it did not require that specific findings be made as to the legal consequences of that evidence:

> "Although the Commission has no power to enjoin conduct as illegal under the Sherman Act, or even to declare such illegality, it certainly has the right to consider a Congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity." (p. 754).

In the instant case, there is no question of the rejection of evidence, as all evidence profferred by Petitioner was admitted.

It is clear that the Commission did consider the evidence relied upon by Petitioner and that a specific finding as to the legal consequences thereof was not required.

V.

PETITIONER WAS NOT DEPRIVED OF A FAIR HEARING

A. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN OMITTING THE INTERMEDIATE DECISION PROCEDURE.

Petitioner contends that the Commission erred in omitting the intermediate decision procedure. Admitting that statutory authority allows the Commission to omit this procedure upon certain findings and that such findings were made, Petitioner argues only that the circumstances recited by the Commission as the reason for its action were not such as to allow it to omit the intermediate decision procedure in this case. The question, therefore, is simply whether the Commission's exercise of its discretion, upon the facts and circumstances recited by the Commission, constituted an abuse of the authority given it by statute.

Section 8(a) of the Administrative Procedure Act,[33]

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[33] Act of June 11, 1946; ch. 324, section 8; 60 Stat. 242; U. S. C. A., Title 5, section 1007(a).

provides that whenever "the agency makes the initial decision without having presided at the reception of the evidence" the officer who presides "shall first recommend a decision." To this requirement there is the following important exception:

> "* * * in rule making or determining applications for initial licenses * * * such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

The Rules of Practice And Procedure of the Commission, Section 1.30(c)(2),[34] implement this authority as follows:

> "In rule making or initial licensing proceedings, the Commission, with or without request or motion therefor, may render the decision upon a finding on the record that due and timely execution of its functions imperatively and unavoidably so requires."

The cases on this subject hold that a commission can omit the intermediate decision procedure in the exercise of a sound discretion where the requisite statutory finding is made. *RCA Communications, Inc.* v. *Federal Communications Commission,* 99 App. D.C. 163, 238 F. 2d 24 (1956); *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 209 F. 2d 717 (C.A. 10, 1953); *Alabama-Tennessee Natural Gas Company* v. *Federal Power Commission,* 203 F. 2d 494 (C.A. 1953); and *Kenney, et al.* v. *United States, et al.,* 103 F. Supp. 971 (D. C., D. N. J., 1952).

Upon joint motion of Houston and Coastal made on November 14, 1956, the Commission in its Order of December 6, 1956 (R. 20337-20338) stated:

> "The record reveals that the gas purchase contracts are subject to cancellation on the grounds asserted by Houston and Coastal. Of paramount interest, however, is the interest of the public in Florida as represented by officials of the State of Florida, the Florida Railroad and Public Utilities Commission, the Orlando

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[34] 18 CFR 1.30(c)(2).

> Utilities Commission, and many municipalities interested in natural gas for the State of Florida."
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> * * *
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> "In view of the foregoing, it appears that the urgency of time requires that the Commission grant the motion of Houston and Coastal. However, it must be understood that the Commission in granting this motion is giving primary consideration to the public interest and not adopting a policy of permitting Applicants to fix and assert date deadlines within which time the Commission must act on applications for certificates of public convenience and necessity as a grounds or basis for waiver of the intermediate decision procedure."

The Commission then found (R. 20338) (1) that the record showed that unless final action was taken by the Commission before December 31, 1956, Coastal's gas purchase contracts would be subject to cancellation, and that unless the intermediate decision procedure was omitted, a decision by Commission could not be rendered before December 31, 1956; and (2) that "upon the basis of the entire record, due and timely execution of its functions imperatively and unavoidably requires that the Commission omit the intermediate decision procedure and render final decision in the proceedings."

Upon the facts and under the circumstances above, the omission of the intermediate decision procedure was not an abuse of discretion. Petitioner asserts that the Commission was not justified in making its determination because there was no evidence in the record that Coastal's producers intended to cancel their contracts. It argues that because the contracts between the Power Companies and their suppliers, which had had cancellation deadlines of December 1, 1956, had been extended to March 1, 1957, the Commission was not justified in giving any consideration to the cancellation provisions in the contracts with the producers. It is beside the point that there was no evidence in the record that any of Coastal's producers intended to cancel their contracts. The contracts spoke for themselves. It is immaterial that the cancella-

tion deadlines in the contracts between different parties than Coastal and Coastal's suppliers had been previously extended.

What is material is that the record showed that 47 gas purchase contracts were by their terms subject to cancellation if a certificate did not issue by December 31, 1956.[35]

The contracts between Coastal and Superior Oil Company[36]—which provide for 236,641 MMcf out of total reserves of 824,275 MMcf dedicated to Coastal (R. 9266, 9267, 9270, 9249, 12238) contained a deadline set out in the form of a condition precedent, by the terms of which Coastal had to receive a certificate of public convenience and necessity by December 31, 1956, or the contracts would *automatically expire.* This and the cancellation clauses in the other contracts posed a major risk that the project would lose some 824 billion cubic feet of resale gas reserves if there were no final decision by that date. The loss of this major gas reserve would have been fatal to the projects. The Commission acted upon this imperative exigency to omit the intermediate decision procedure, for the purpose of avoiding this possible failure of the projects. This it reiterated in Opinion No. 301 (R. 20412).

The case of *Channel 16 of Rhode Island* v. *Federal Communications Commission,* 97 App. D. C. 179, 229 F. 2d 520 (1956), cited by Petitioner, has no relevance here. In that case, the agency had established a special procedure in which the decision of the Examiner was limited to specific issues and other issues were to be decided by the agency.

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35 Typical of the deadline provisions is the following taken from the contract between Coastal and the Shell Oil Company:

> "This agreement is subject to the following conditions: * * *
> "2. The obtaining by Coastal on or before December 31, 1956, from the Federal Power Commission of a certificate of Public Convenience and Necessity * * *" (R. 8922, 8923).

Similar provisions appear in 42 other contracts.

36 Provisions in the fine contracts between Coastal and Superior, while not reproduced in the Joint Appendix, can be found on pages 8976, 8977, 9027, 9028, 9079, 9080, 9131, 9132, 9183, and 9184 of the certified record in this proceeding.

In establishing this procedure, the agency did not make the requisite statutory findings for omission of the Examiner's decision. The Court held that such procedure violated the statutes concerning hearings and omission of the initial [intermediate] decision procedure.

We submit that the Commission did not abuse its discretion in this proceeding, for as the Commission correctly observed in its Order of February 21, 1957 (R. 20907):

> "The requisite statutory findings were made and are supported by the facts. The Commission's functions obviously would fail of effectuation if proposed projects of the extent and importance of these were permitted to die by reason of Commission inaction without ever reaching the merits, where the law in such exigent circumstances explicitly provides an avenue for taking action and reaching a decision."

B. PETITIONER WAS NOT DENIED A FAIR HEARING BECAUSE OF THE TIME GRANTED FOR BRIEFING AND THE TIME INVOLVED IN REACHING DECISION.

1. Petitioner Was Not Denied a Fair Hearing Because of the Time Granted for Briefing.

Petitioner does not question the power of the Commission to set briefing dates, but complains that the settings in this case denied it a fair hearing because the time allowed for briefing was too short.

When the hearing concluded on November 28, the Examiner set the dates for briefing. Petitioner's brief was to be filed on December 20. The Commission then granted the joint motion for omission of the intermediate decision procedure, and set dates for briefing which superseded those set by the Examiner. Under that setting, Petitioner's brief was scheduled to be filed on December 15. As that date fell on Saturday, Petitioner had until Monday, December 17, to file its brief.[37] Although the Commission originally denied oral argument (R. 20337-20339), thereafter it granted Petitioner's request for oral argument (R. 20355-20356), which was held December 21.

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[37] Federal Power Commission, Rules of Practice and Procedure, Sec. 1.13(a). (18 CFR 1.13(a)).

Petitioner complains that it was denied a fair hearing on this point solely because the time for briefing as set by the Commission was three days shorter than the time as set by the Examiner and as requested by the Petitioner of the Commission. (R. 8106, 20346-20350). In its motion to extend the time to December 20, Petitioner did not assert any reason which would preclude it from filing its brief on December 17. Nor does Petitioner do so here.

It is important to note that: (1) when the Examiner set the briefing dates, no provision was made for oral argument before him, (2) oral argument was granted before the Commission, and (3) oral argument was scheduled and held *after* the date to which Petitioner had requested its briefing time be extended.

We submit that Petitioner was not denied a fair hearing by the fact that it had three days less for briefing than it had been granted by the Examiner and than it had requested of the Commission, particularly since the Commission granted oral argument on a date subsequent to that requested.

2. Petitioner's Charge That the Commission Could Not Properly Have Considered This Case Due to the Time Involved Is Without Substance.

Petitioner's charge that the Commission could not have properly considered the evidence and arguments presented is an allegation unsupported by facts or affidavit. The very detail of the Opinion refutes the charge. Moreover, the Commission expressly stated that all matters were considered.

In its Order of December 28, the Commission said:

> "Such arguments, contentions and objections advanced by any party to this proceeding as have not been specifically disposed of herein have been considered but are without substantial support in the record or reasonable basis in law, or should be reserved for future consideration in an appropriate proceeding" (R. 20438).

In denying the Petitioner's Petition for Rehearing, the Commission said:

> "The Florida Economic Advisory Council and the railroads also argue that the Commission's decision was reached so quickly that the Commission had insufficient time to consider the case fully and with due deliberation. Thus, in this case, we encounter the novel situation of parties complaining not of administrative delay but of administrative dispatch. However, we find the complaints unjustified, if unusual. . . . It is sufficient that we are satisfied that this case received consideration as full and careful as it would if dealt with on a routine basis" (R. 20907).

Petitioner attempts to refute the foregoing statements solely on the basis of the time involved in reaching the decision on December 28, 1956. This date was 30 days after the conclusion of the hearing, 23 days after the submission of the briefs of Houston and Coastal, 13 days after the filing of Petitioner's brief, 8 days after reply briefs were filed and 7 days after oral argument was had before the Commission.

In a number of cases, petitioners have attacked similar recitations of regularity made by administrative agencies upon allegations that the agency had failed to consider the entire record. The law is clear that such recitations cannot be challenged by mere allegation. *NLRB* v. *Biles-Coleman Lumber Co.*, 98 F. 2d 16 (C. C. A. 9, 1938); *Cupples Co. Manufacturers* v. *NLRB*, 103 F. 2d 953 (C. C. A. 8, 1939); *Inland Steel Co.* v. *NLRB*, 105 F. 2d 246 (C. C. A. 7, 1939); *NLRB* v. *Lane Cotton Mills Co.*, 108 F. 2d 568 (C. C. A. 5, 1940); *NLRB* v. *Ford Motor Company*, 118 F. 2d 766 (C. C. A. 9, 1941); *Twin City Milk Producers Association* v. *McNutt*, 122 F. 2d 564 (C. C. A. 8, 1941); and *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676 (C. A. 9, 1949).

The *Inland Steel Co.* case, *supra*, and the *Lane Cotton Mills Company* case, *supra*, make the point that where there have been oral arguments and briefs before the Board there is no circumstance to warrant the Court going behind the recitation of regularity of the Order.

The *Willapoint Oysters* case, *supra,* sets forth the reasons for attachment of the presumption of validity to such recitations:

> "Furthermore, we cannot allow the Administrator's recitation that he has personally examined and considered the evidence in making his decision to be successfully challenged by a mere allegation in a brief. We have neither moral nor legal right to presume that only those who occupy judicial office respect their obligations and perform their official duties honestly, sincerely and conscientiously. Nor can we presume the subordinate personnel to be a camarilla. It requires more than mere allegation (or affidavit on information and belief, which is not even found here) to upset the presumption of validity attaching to public proceedings and the formal recitations of public officials" (p. 696).

Nor do the deciding officers need to read all of the record. They may depend upon the assistance of subordinates in considering the relevant parts thereof. *Cupples Co. Manufacturers* v. *NLRB, supra.*

It is evident from the exhaustive and detailed analysis contained in the Commission's Opinion and Order No. 301 that the Commission had an intimate knowledge and acquaintance with the entire record. The basic assumption that the Commission had properly discharged its official duties is amply supported by the facts.

Petitioner was not deprived of a fair hearing by reason of the time involved in reaching the decision in this case.

C. PETITIONER WAS NOT DEPRIVED OF A FAIR HEARING MERELY BECAUSE THE ORDER OF FEBRUARY 21 MODIFIED THE ORDER OF DECEMBER 28 WITHOUT HEARING, AND BECAUSE PETITIONER WAS NOT ALLOWED TO PETITION FOR REHEARING OF THE MODIFYING ORDER.

Petitioner's complaint that it was denied a fair hearing by the Commission's Order of February 21, relates only to the modification without hearing of the Order of December 28. Its objection to the Order dated April 18, 1957 is based upon the Commission's rejection of Petitioner's Petition for Rehearing of the Order of February 21.

Petitioner contends that the Commission could not modify the Order of December 28 without a hearing. This argument fails in view of the Commission's express authority under Section 19(a) of the Act to modify an Order without further hearing:

> "Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or *modify its order without further hearing.*" (Emphasis added.)

Petitioner's assertion that it was denied a fair hearing by the rejection of its petition for rehearing of the modifying order is likewise without merit. Its position with respect to the Order of December 28 and its rights under that Order were not adversely altered or affected by the Order of February 21. Only two relatively minor conditions were modified or eliminated by that Order. The first of these, that Houston's minimum bill for general firm service be based, at least in part, upon demand, on a monthly rather than an annual basis, would have penalized the Florida distributors in many summer months, because of their low load factor. The minimum bill devised, and accepted by the Commission, permits the customer to apportion its annual quantity of gas by *months* for the purpose of fixing the minimum bill for each month of the year, and reduces the minimum bill from 65 per cent annually to 50 per cent of the estimates of the customers for each month (R. 20467-20470, 20490, 20901). The controlling considerations of the customers were thereby more nearly met, and the Commission's condition was satisfied in substantial part. The second condition, which was eliminated by the Commission, required that certain conditional cancellation clauses be eliminated from the direct sale primary interruptible contracts of Houston. The gas sales involved are not subject to the jurisdiction of the Commission and constitute but 3.4 per cent of the estimated gas deliveries during the third year of operation (R. 14433, 20901). The clauses in question had a *de minimus,* if any, effect on the projects, especially after the cancellation provisions of the more important

transportation agreements were eliminated pursuant to other conditions. The two conditions thus modified or eliminated were each of minor importance and the foregoing changes in them by the Order of February 21 did not effect any adverse change in the position or interests of Petitioner.

Additionally, Petitioner lacks standing to request a rehearing of this Order. In *Arkansas-Louisiana Gas Co.* v. *Federal Power Commission, supra,* the court treats the question of aggrievement and standing of a party other than the party to which the conditions were applicable, as follows:

> "But, if we could abstractly agree, this would not avail petitioner, for it is aggrieved, not by the imposed conditions but by the granting of the permit and under the statute, it may complain here only of an order by which it is aggrieved.
>
> "If the petitioner is right that the conditions may not be lawfully imposed, this is for the applicant to complain of and obtain relief against, not for the petitioner" (pp. 283-284).

Petitioner, therefore, has no standing to petition for rehearing of the Commission's Order of February 21 and its objection to the Order of April 18, 1957, the subject of Case No. 13,952 herein, is without merit.

Moreover, under the doctrine of *Alston Coal Co.* v. *Federal Power Commission, supra,* Petitioner is precluded from inquiry as a competing fuel interest into the rate and tariff matters dealt with in the Order issued February 21. In that case, the Court upheld the Commission in denying the petition to intervene filed in a rate case by a competing fuel interest.

In view of the Commission's express statutory power to modify its previous Order without hearing and of the lack of standing of Petitioner to request rehearing of such modifying Order, the issuance of such Order without hearing and the rejection of Petitioner's Petition for Rehearing thereof did not deprive Petitioner of a fair hearing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Orders here under review should be affirmed.

Respectfully submitted,

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September 10, 1957

APPENDIX A

Federal Power Commission Regulations (18 C.F.R.)

Section 1.13(a):

"(a) *Computation of time.* Except as otherwise provided by law, in computing any period of time prescribed or allowed by this part, by any rule, regulation, or order of the Commission, or by any applicable statute, the day of the act, event, or default from or after which the designated period of time begins to run shall not be included, but the last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday in the District of Columbia, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or a holiday. A part-day holiday shall be considered as other days and not as a holiday."

Section 1.30(c)(2):

"(2) In rule-making or initial licensing proceedings the Commission, with or without request or motion therefor, may render the decision upon a finding on the record that due and timely execution of its functions imperatively and unavoidably so requires."

Section 154.38(d):

"(d) *Statement of rate.* (1) Except as permitted in subsections 154.52 and 154.82, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

"(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

"(3) No rule, regulation, exception or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however,* a natural-gas company may state in the service agreement or in rate schedules filed pursuant to section 154.52 that it is or will be its privileges under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further,* That no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, amended, and the regulations in this part.

Section 154.92(b):

"(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed."

Section 1007 (a):

In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

Section 1009. *Judicial review of agency action.*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court)

is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, Section 10, 60 Stat. 243.

APPENDIX B

Conditions Attached to Certificates of Public Convenience and Necessity Issued to Houston Texas Gas and Oil Corporation and Coastal Transmission Corporation by Commission's Opinion No. 301 and Accompanying Order of December 28, 1956.

"(B) Houston Gas shall within 30 days of the issuance of this order file with the Commission in accordance with its regulations and satisfactory to the Commission, a revised FPC Gas Tariff containing rate schedules and executed service agreements thereunder for general firm service, preferred interruptible service and transportation service for Florida Power & Light and Florida Power, in accordance with the following:

"(1) The rates set forth in the tariffs for firm sales for resale, interruptible sales, and for transportation, shall be commensurate with the cost of service determined on a reasonable allocation of costs between these services in accordance with usual Commission standards and based on a rate of return of not in excess of 6%.

"(2) Rate Schedules and service agreements for the transportation of gas shall not include provisions for their cancellation or for reductions in take, such as those appearing in Sections 7, 22 and 38 of Rate Schedule T-1 for service to Florida Power and in Sections 7, 22, 37, 39 and 45 for Rate Schedule T-2 for service to Florida Power & Light.

"(3) The minimum-bill provision in paragraph (4) of Houston Gas' present rate schedule for general firm service shall be modified to provide a minimum bill that is based, at least in part, upon demand, and on a monthly rather than an annual basis.

"(4) Cancellation provisions appearing in Houston Gas' contracts for direct primary interruptible service shall be eliminated.

"(5) Houston Gas' tariff filing shall in all other respects comply with the Commission's Regulations under the Natural Gas Act as stated herein.

"(C) Coastal shall within 30 days of the issuance of this order file with the Commission in accordance with the provisions of Section 154.31 through 154.41 of its regulations and satisfactory to the Commission, an FPC Gas Tariff as follows:

"(1) The tariff shall provide for charges by Coastal for services to Houston Gas based on a cost-of-service formula.

"(2) The cost-of-service formula shall provide separate charges (a) for gas sold by Coastal to Houston Gas and (b) for gas transportation service rendered to Houston Gas with respect to gas transported to Florida Power & Light and Florida Power. Such separate charges shall be based on a reasonable allocation of costs between the two services in accordance with the usual Commission standards.

"(3) The charges to be made for the first six month period of operation shall be based on a rate of return of 6% and the charges for succeeding six month periods shall be based on the overall rate of return of the two companies for the preceding six months period but not more than 6%.

"(4) Working capital, as computed in its cost-of-service formula, shall be credited with federal income tax accruals to the extent of 50% of the annual tax allowance in accordance with usual Commission standards.

"(5) The provisions now appearing in Article VI and Article XIV, paragraph 1 (b) of Coastal's Tariff for service to Houston Gas providing for an increase in the allowance made Coastal with respect to gas from its own reserves shall be eliminated.

"(6) The provision now appearing in Article XIV, paragraph 1(g) of the tariff, which grants credit to Houston Gas where Coastal removes heat content from gas which it has purchased and transports shall be made to apply also to gas from Coastal's own production or else the credit shall be removed altogether.

"(7) Coastal's filing shall in all other respects comply with the Commission's Regulations under the Natural Gas Act.

"(D) Houston Gas and Coastal shall submit for approval prior to undertaking to put it into effect a financing plan satisfactory to the Commission. Such plan shall include copies of any proposed agreements with underwriters or others, for their respective pipeline projects, and for the acquisition of distribution properties by Houston Gas based on common equity of at least 15 percent, and bonded indebtedness of not greater than 75 percent. The balance of the capitalization may be represented by interim notes, which may remain outstanding as long as no dividends are paid on the common stock.

"(F)[1] There shall be attached to the exercise of the rights, granted Houston Gas and Coastal under paragraph (A) herein, the following conditions.

"(1) The general terms and conditions set forth in paragraphs (a), (b), (c) (1), (c) (2), (c) (3), (c) (4) and (e) of Section 157.20 of the Commission's Regulations under the Natural Gas Act.[2]

"(2) All the facilities authorized in paragraph (A) shall be constructed and placed in actual operation on or before June 30, 1958."

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[1] Paragraph (F) corrected and designated paragraph (E) by Errata notice issued by the Commission on February 11, 1957.

[2] Section 157.20 of the Commission's Regulations under the Natural Gas Act covers general conditions applicable to certificates. These Regulations have not been included in the interest of brevity.

"(F) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Regulations thereunder requiring the filing of rate schedules for the service herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants. Further, the action taken in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the contracts herein involved."

JOINT BRIEF FOR INTERVENORS FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION AND FLORIDA DEVELOPMENT COMMISSION

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,962

No. 13,962

On Petition for Review of Orders of the Federal Power Commission

September 18, 1961

INTERVENORS' COUNTER-STATEMENT OF QUESTIONS PRESENTED

In the opinion of intervenors, Florida Railroad and Public Utilities Commission and Florida Development Commission, the questions presented are:

1. Is an organization of water and highway carriers, marketers, distributors and retailers of petroleum and petroleum products an aggrieved party under Section 19(b) of the Natural Gas Act when it completely fails to establish that it has or it represents others having a legal right or interest that will be injuriously affected by the issuance of certificates of public convenience and necessity by the Federal Power Commission?

2. Was there substantial evidence in the record before the Federal Power Commission to support its finding of fact that the present and future public convenience and necessity requires the service proposed, and to support the issuance of the certificates of public convenience and necessity with conditions attached?

3. Was Petitioner granted due process of law when Respondent omitted the intermediate decision procedure, scheduled the due date for briefs and oral argument within a relatively short time after the hearing adjourned, where the record showed that the gas supply for Florida would be lost if a prompt decision were not rendered; and, was Petitioner entitled to a hearing on applicants' compliance with Respondent's conditions?

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,833

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*
COASTAL TRANSMISSION CORPORATION, HOUSTON TEXAS GAS AND OIL CORPORATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION AND FLORIDA DEVELOPMENT COMMISSION, *Intervenors*

No. 13,952

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for Review of Orders of the Federal Power Commission

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JOINT BRIEF FOR INTERVENORS FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION AND FLORIDA DEVELOPMENT COMMISSION

COUNTER-STATEMENT OF THE CASE

Pursuant to Rule 17(e)(3), we adopt the counter-statement of the case appearing in the briefs of Respondent and intervenors, Houston Texas Gas and Oil Corporation (hereinafter referred to as "Houston") and Coastal Transmission Corporation (hereinafter referred to as "Coastal")

with the additional following statement, the purpose of which is to present to this Court those matters more directly relating to the interest of the intervenors herein (Florida Railroad and Public Utilities Commission and Florida Development Commission).

The Florida Railroad and Public Utilities Commission (hereinafter referred to as "Florida Railroad Commission") filed a notice of intervention in the consolidated proceedings before Respondent on March 30, 1956, and actively supported Houston and Coastal in those proceedings. (R. 17990). On May 24, 1957, the Florida Railroad Commission was permitted to intervene in the appeal before this Court.

The Florida Railroad Commission has intrastate jurisdiction to regulate and supervise electric and gas plants with respect to rates, service, and the issuance and the sale of securities maturing more than 12 months after date of issue. In addition to its function of regulating public utilities within the state, it is concerned with the public interest of the entire State of Florida.

Of the intervenors from Florida participating in the proceedings before Respondent,[1] the following companies are

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[1] These intervenors are as follows: Orlando Utilities Commission, Florida Public Utilities Company (serving Palm Beach County area), Jacksonville Chamber of Commerce, Sanford Gas Company, Florida Home Gas Company (serving DeLand), Ocala Gas Company, Southern Gas and Electric Corporation (serving Bradenton and Sarasota), City of Leesburg, City of St. Petersburg, South Atlantic Gas Company, Putnam Gas and Fuel Company (serving Palatka), Triangle Gas Company, City of Starke, Gainesville Gas Company, City of Lake City, City of Madison, Peoples Water and Gas Company (serving Miami area), Tampa Gas Company, City of Lakeland, Central Florida Gas Corporation, City of Plant City, City of Lake Alfred, City of Avon Park, City of Clearwater, City of Ft. Pierce, City of Tallahassee, City of Blountstown, Florida Power Corporation, City of Green Cove Springs, City of New Smyrna Beach, City of Auburndale, City of Okeechobee, City of Jasper, Florida Power & Light Company, Jackson-Holmes-Gadsden-Washington Counties Gas District, The Geneva County Gas District, City of Perry, City of Live Oak, West Florida Gas and Fuel Company (serving Panama City), Town of Frostproof, Florida Development Commission, Florida State Chamber of Commerce, Jacksonville Gas Corporation, Sebring Utilities Commission, Minute Maid Corporation, W. R. Grace & Company (Davidson Chemical Company Division) Buckeye Cellulose Corporation, Rayonier Incorporated, International Paper Company, International Minerals & Chemical Corporation, Hudson Pulp & Paper Corporation, Container Corporation of America, St. Marys Kraft Corporation and Superior Oil Company. (R. 17550-18008; R. 18020)

under the jurisdiction of the Florida Railroad Commission: Central Florida Gas Corporation, Florida Power & Light Company, Florida Home Gas Company, Florida Public Utilities Company, Gainesville Gas Company, Jacksonville Gas Corporation, Ocala Gas Company, Southern Gas and Electric Company, Tampa Gas Company, Triangle Gas Company and Florida Power Corporation. The gas companies under the jurisdiction of the Florida Railroad Commission presently serve approximately 150,000 customers and the electric companies serve approximately 700,000 customers. In the winter season, this number materially increases. (R. 2696-2701)

The Florida Development Commission filed its petition for leave to intervene in the proceedings before Respondent on March 26, 1956 (R. 17622-17627) and actively supported Houston and Coastal before the Commission. On May 24, 1957, this Court granted it permission to intervene herein.

The Florida Development Commission is an agency of the State of Florida, created under the provisions of Chapter 288, Florida Statutes, 1955. The Development Commission is charged with the responsibility of promoting the co-ordinated, efficient and beneficial development of the State and its natural resources. It is authorized to promote, foster and encourage the development of Florida industries. Its particular interest in this proceeding before Respondent was and is to assist the people and the industries of Florida in obtaining a second fuel and to reduce the disadvantage with respect to fuel and energy under which the people and the industries of Florida are now placed because of their dependence on a single source of fuel. (R. 2765-2766)

Both the Florida Railroad Commission and the Florida Development Commission are official statutory agencies of the State of Florida and are the duly and legally constituted representatives of the public interest of Florida.

Petitioner, on the other hand, is a private organization which purports to represent the limited and special interests of a portion of those engaged in marketing and transporting petroleum products in the State of Florida. In spite of its name this organization is not an official body and does not represent any branch of the government of Florida concerned with the economic welfare of the state. One of its announced purposes is to resist the introduction of natural gas into Florida. (R. 3485; 7875)

Petitioner was permitted to intervene by Respondent in these proceedings as an unincorporated association. (R. 17661-17665) On October 18, 1956, midway through the proceedings held before Respondent, Petitioner sought by motion to sustitute for the unincorporated association a nonprofit corporation organized on October 2, 1956, under the laws of the State of Florida with the name, purposes, functions, officials, directors and members identical with those of the unincorporated association. (R. 20321-20323)

Petitioner appeared by counsel and participated actively from the first day through the last day of the hearings before Respondent. Petitioner also produced testimony and exhibits in support of its position and in opposition to the applicants' cases.

The overall public demand and need for natural gas within the State of Florida was established by many witnesses. Peninsular Florida is one of the very few large areas of the United States not now supplied with natural gas. Florida is the only state with practically no native usable energy supply, being 99 percent dependent on imported energy. Florida is now dependent almost entirely on petroleum products, chiefly fuel oil and kerosene, imported by tanker and barge.

Florida is at a disadvantage because of its dependence upon a single source of energy and the inherent hazards thereof. Illustrative is the critical fuel and energy position of Florida during the Second World War, which re-

sulted from the heavy sinkings of tankers and swollen military oil needs during that conflict. Not only the heating and industrial fuel supply but the electrical and petroleum gas supply of the state were gravely threatened by the conditions then existing. Natural gas offers Florida a second source of energy which, during peacetime, would provide competition among fuels with the attendant advantages over the fuel monopoly situation which presently exists in Florida.

Natural gas would provide substantial savings to household and industrial customers and make available to these consumers the cleanest fuel available. Natural gas will aid Florida in its economic development by removing the present barrier of high energy costs which have served to retard the location and development of industrial firms in the State of Florida. The public interest of Florida demands the introduction of natural gas to meet the needs of the State's ever-growing population and to develop fully its industrial potential as well as to secure for Florida the economic advantages already possessed by other and neighboring states. (R. 1417-1432; 2765-2772)

Houston's proposed service area in Florida in one of the few remaining parts of the country that does not have natural gas will have a population of approximately 2,150,000. (R. 799-800)

Houston proposes to render three categories of service to consumers within the State of Florida: (1) The sale of natural gas for resale through both municipally and privately-owned systems to the citizens of Florida; (2) the direct sale of natural gas to industrial customers; and (3) the transportation of natural gas owned by the Florida Power & Light Company and the Florida Power Corporation for their own use in their electric generating plants.

The primary interruptible electric generating customers will effect substantial savings in fuel costs by conversion of their present facilities from use of Bunker "C" fuel

oil to the use of natural gas at the rates proposed to be charged by Houston. (R. 961; 1205; 1257; 1862; 1965-1967; 2050-2051)

The savings in fuel costs for generation of electricity by the two privately-owned power plants to be served by Houston will redound to the benefit of the power companies' customers due to fuel adjustment clauses in their tariffs filed with the Florida Railroad Commission. (R. 2699) Under this arrangement as the prices of fuel decrease, the decrease is automatically reflected in the monthly bills of the utility customers. (R. 2699-2700; 4008)

The total dollar saving to result from the use of natural gas by resale customers and direct sale and transportation service customers will be $14,566,000 in the first year of operation and $18,403,000 in the third year of operation. (R. 7110-7111) The natural gas used in power plant boilers is destined to fulfill the same ultimate function of space heating as the gas used directly in the home, with the added benefit of summertime cooling by reversing the action of the heat pump to serve as an air conditioner. This machine is important in the warmer summer climate of Florida. (R. 4012-4014)

SUMMARY OF ARGUMENT

Respondent found that gas supply, markets, adequacy of facilities, economic feasibility and financing were firmly established by the proof and that the public convenience and necessity required the issuance of the certificates subject to certain rate, tariff and financing conditions. Respondent found from the evidence that Houston and Coastal are able and willing properly to do the acts and perform the service proposed and that such proposed service is required by the public convenience and necessity. Upon acceptance and filing material in compliance with the conditions, Houston and Coastal fully met the requirements of Respondent under Section 7 of the Natural Gas Act.

There was substantial evidence in the record to support the requisite findings made by the Respondent that the public convenience and necessity requires the proposed pipelines. Petitioner has raised no question of Respondent's erring in the admission or rejection of any evidence nor is there any contention that Respondent failed to consider or weigh any evidence. Therefore, under Section 19 of the Natural Gas Act the findings of the Respondent are conclusive.

Proof favoring the projects of Houston and Coastal in Florida was overwhelming. The evidence presented by Petitioner was without probative value. Petitioner failed to show by competent evidence any adverse effect upon it and is therefore not an aggrieved party entitled to review under the Natural Gas Act.

Respondent may lawfully impose conditions on certificates of public convenience and necessity and is not required to hold a hearing upon request of a competing fuel interest to test whether such conditions were complied with by the applicants. Respondent did not err in omitting the intermediate decision procedure, in scheduling the due dates for briefs, in allowing oral argument and in rendering its opinion promptly because such procedure was supported by law, and the factual circumstances surrounding the case justified such action. Respondent accorded Petitioner a fair and full hearing in all respects and Petitioner availed itself thereof.

Petitioner has invoked a shot-gun procedure in its petition for review and in its brief by selecting certain procedural steps and injecting facts inferentially leading to erroneous conclusions on the substantive merits via such procedural matter. Respondent's order on each of these procedural issues is supported by the voluminous record.

Florida public demand for natural gas is tremendous. The Natural Gas Act does not protect a competing fuel interest whose product may be displaced when Respondent

finds from substantive evidence that the public convenience and necessity requires the natural gas pipeline. Respondent is not charged with the anti-trust enforcement and is governed by the evidence on the public convenience and necessity.

ARGUMENT

I

AN ORGANIZATION OF WATER AND HIGHWAY CARRIERS, MARKETERS, DISTRIBUTORS AND RETAILERS OF PETROLEUM AND PETROLEUM PRODUCTS, IS NOT AN "AGGRIEVED" PARTY UNDER SECTION 19(b) OF THE NATURAL GAS ACT WHERE IT FAILS TO ESTABLISH THAT IT HAS, OR REPRESENTS OTHERS HAVING, A LEGAL RIGHT OR INTEREST THAT WILL BE INJURIOUSLY AFFECTED BY THE ORDER UNDER REVIEW

Section 19(b) of the Natural Gas Act (Act of June 21, 1938; c. 556, § 19, 52 Stat. 81, U.S.C. Title 15, § 717(b)), provides in part:

> "Any *party* to a proceeding under this chapter *aggrieved* by an order issued by the Commission in such proceeding may obtain a review of such order * * * ." (Emphasis supplied)

Petitioner was permitted by Respondent to intervene as an unincorporated association composed of water and highway carriers, marketers, distributors and retailers of petroleum products in the State of Florida (R. 17662), but as Respondent's order permitting intervention expressly stated

> "The admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order or orders of the Commission entered in these proceedings." (R. 18030)

The present legal organization of Petitioner is indefinite. Its Petition for Review has dodged the question of whether Petitioner is appearing before the Court as an unincorporated association on behalf of individuals or as a nonprofit corporation.

The person who is president of both the unincorporated association and the nonprofit corporation (R. 7883) testified that Petitioner's purposes were those set forth in the corporate charter (R. 7820; 7873-7875) and gave other testimony as a witness for the nonprofit corporation.

One thing is clear, however, and that is that both the nonprofit corporation and the association were organized to oppose the applications of Houston and Coastal and to block the advent of natural gas to Florida (R. 3485; 7875).

Intervenors do not question any "standing to sue" of Petitioner. No such issue is here involved. What intervenors do question is whether this Petitioner, although a party, has established its right to seek review as a party "aggrieved" within the meaning of Section 19(b) of the Act. Mere admission of Petitioner as an intervenor in these proceedings does not establish "aggrievement" as Respondent's order permitting intervention, quoted above, expressly noted (R. 18030). Also see *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 219 F. 2d 729 (C.A. 3d 1955); *Associated Industries of New York, Inc.* v. *Ickes*, 134 F. 2d 694 (C.A. 2d 1943); Sec. 1.1 (f)(13) of the Federal Power Commission's Rules of Practice and Procedure (18 CFR 1.1(f)(13)). More than a mere naked assertion of aggrievement is required. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 219 F. 2d 729, *supra*.[2]

Despite Petitioner's attempts to establish itself as an "aggrieved" party, the record remains bare of evidence justifying findings of the effect of Houston's and Coastal's projects upon a single member of Petitioner's organization or upon the non-profit corporation.

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[2] See also Interstate Electric, Inc., v. Federal Power Commission, 164 F. 2d 485 (C.A. 9th 1947); United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F. 2d 116 (C.A. 2d 1943); Pittsburgh Radio Supply House v. Federal Communications Commission, 69 App. D.C. 22, 98 F. 2d 303 (C.A. D.C. 1938); *cf.* National Coal Ass'n v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F. 2d 462 (C.A. D.C. 1951); National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 132 F. 2d 545 (C.A.D.C. 1942), *aff'd*, 319 U.S. 239; 63 S. Ct. 1035, 87 L. ed. 1374 (1943).

Petitioner submitted only one exhibit[3] to show the alleged adverse effect upon Petitioner's members that would result from the introduction of natural gas into Florida. This exhibit was without probative value for several reasons, including the following: (1) While Petitioner is composed of 119 members only 36 (or less than one third of the total membership) are covered by this exhibit; (2) Exhibit 306 was confined to four districts only and did not include data from a fifth district (R. 7830); (3) the districts covered were not related in any manner to the proposed route of the pipeline or to customers to be served therefrom (R. 7889) and, accordingly, no meaningful showing of displacement of petroleum products was presented; (4) Exhibit 306 shows only alleged loss of gross revenues. Apparently loss of net profit could not be determined (R. 7844); and (5) on the grounds that the figures submitted were "confidential", Petitioner cloaked the identity of the few participating members in a code and would not divulge their names. Other parties to the proceeding were, therefore, unable to investigate and test the accuracy of figures submitted. Insistence on anonymity deprived even this limited data of any probative value (R. 7833; 7877).

It is on the basis of this uncertain, unreliable, indefinite and speculative evidence that Petitioner seeks to have itself declared an "aggrieved" party within the meaning of Section 19(b) of the Natural Gas Act. Under the doctrine of this Court as enunciated in *National Coal Ass'n* v. *Federal Power Commission,* 89 App. D.C. 135; 191 F. 2d 462 (C.A.D.C. 1951), Petitioner is not an aggrieved party. It has failed to show that the loss of business of Petitioner or its members resulting from the introduction and sale of natural gas in Florida is reasonably certain or definite. The record is devoid of any showing of actual injury to be caused by natural gas' displacement of oil now used by any present customers of the oil com-

[3] Exhibit 306 (R. 7828-7829; 14593-14595)

panies. To the contrary, Petitioner's president himself asserted that Houston's and Coastal's inroad would be only nominal (R. 7821; 7895-7896).

In *Charleston & W. C. Ry.* v. *Federal Power Commission*, 98 App. D.C. 241, 234 F. 2d 62 (C.A.D.C. 1956), this Court affirmed Respondent's order authorizing a natural gas pipeline to deliver gas to South Carolina Generating Company. Petitioners in that appeal were also competing fuel interests. Their position was that the loss of revenues resulting from such displacement would injure the public interest more than it would be compensated by the benefits of the pipeline facility.[4] Respondent found in that case, as it did in the Opinion 301 under review here, that savings accruing from the use of a more economical fuel would eventually redound to the benefit of the ultimate consumers of electricity. Petitioners had alleged aggrievement since the introduction of natural gas would displace the competing fuel. In reviewing the evidence below this Court found that

> "* * * these statistics were not translated by the evidence into figures showing net decrease of revenues to mine-owner petitioners, nor was the specific effect of the displacement on sales or mine employment shown."

and the Court concluded:

> "* * * [w]e find no legal basis for overturning the decision of the Commission. The Commission weighed the factors which competed in their minds on the issue of public convenience and necessity, with the evidence bearing thereon. Important among these factors is

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[4] In Respondent's order of February 21, 1957, denying Petitioner's application for rehearing the Respondent stated:

> "But it is said we did not make specific findings on the extent of the losses which competing fuel interest would sustain, nor were findings made on other matters, such as the extent of Commission jurisdiction over the producers selling to the power companies. * * * The matter of losses to competing fuel interests was considered and our findings, which we here reiterate, of over-balancing public benefits resulting from the authorizations granted sufficiently dispose of this matter." (R. 20906)

> the public interest in railroad transportation, and in the status of coal mining in its employment and other economic aspects. But the Commission considered these matters. The conclusion reached in favor of the application is not unreasonable, and no significant procedural error appears."
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> * * *
>
> "We are somewhat fortified in so holding by the inability of petitioners to be more specific as to their net losses, * * * "[5]

As shown hereinabove, Petitioner's evidence on fuel displacement resulting from the introduction of natural gas, and hence its aggrievement from the granting of the certificates by Respondent, is without probative value. Since Petitioner has failed to show it is aggrieved under Section 19(b) of the Natural Gas Act, this appeal should be denied for that reason alone.

II

THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE THE FEDERAL POWER COMMISSION ON THE TWO CONSOLIDATED PIPELINE APPLICATIONS TO SUPPORT THE FINDING THAT THE PUBLIC CONVENIENCE AND NECESSITY REQUIRES THE SERVICE PROPOSED, AND TO SUPPORT THE ISSUANCE OF THE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY WITH CONDITIONS ATTACHED, AND IT IS WITHIN THE COMPETENCE OF RESPONDENT ALONE TO PASS UPON MATERIAL FILED IN COMPLIANCE WITH SUCH CONDITIONS

Intervenors, Florida Railroad Commission and Florida Development Commission, submit that if this Court does not reject Petitioner's appeal on the issue of aggrievement, this case should be decided upon this question:

> Was there substantial evidence in the record before Respondent to support the basic findings and Respondent's conclusion, based thereon, that the public convenience and necessity requires the service proposed?

Section 7(e) of the Natural Gas Act provides that the Commission shall issue a certificate of public convenience

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[5] See also, *Cincinnati Gas & Electric Co.* v. *Federal Power Commission*, (C.A.D.C. No. 13,557, decided June 20, 1957); *National Coal Ass'n* v. *Federal Power Commission*, (C.A.D.C. No. 13,582, decided June 20, 1957)

and necessity if it finds that the applicant is able and willing to do the acts and perform the service proposed and if such proposed service is or will be required by the present or future public convenience and necessity. This same section of the Act also specifically provides that Respondent shall have the power to attach reasonable terms and conditions to the issuance of such certificates.

Petitioner does not raise any error committed by the Respondent in the admission of evidence offered by Houston and Coastal or in the rejection of any evidence offered by Petitioner. Petitioner does not contend that Respondent failed to consider or weigh the evidence offered by Petitioner.

The evidence on the findings prerequisite to the issuance of a certificate of public convenience and necessity regarding economic feasibility[6] and reasonable financing[7] was substantial. The evidence as to available gas supply[8] adequate facilities[9] and adequate markets[10] was uncontro-

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6 Respondent's Opinion 301, R. 20422.

7 *Ibid.*, R. 20433-20434.

8 *Ibid.*, R. 20416.

9 *Ibid.*, R. 20421.

10 Respondent's Opinion 301 stated as follows:

"The record establishes the existence in Florida both of a desire and need for natural gas, and of the existence of markets ready and waiting for all the volumes of gas applicants propose to transport and to sell under their plan of operation. The public demand and need for gas were attested to by numerous state and city officials as well as representatives of consumer interests and others. The existence of particular markets is demonstrated by the numerous service agreements and contracts entered into and by letters of intent to enter into such agreements. Clearly, there exist in the territory proposed to be served, customers who can reasonably be expected to take on the proposed service.

"The public need for gas in Florida and the corresponding benefits of gas service to consumers in that state derive from a number of circumstances. We have already mentioned some of the market factors which favor the introduction of natural gas to Florida. It is obviously at a disadvantage, both competitively and otherwise, by its dependence upon petroleum products, a single source of fuel. For example, during World War II, the heating and industrial fuel supply, as well as the electrical and petroleum gas supply of the state, were critically threatened by the tanker sinkings and the enlarged military oil needs of that time. The introduction of natural gas, in addition to making available to consumers in Florida the usual benefits of natural gas of cleanliness, convenience and economy, would provide a second source of fuel to help forestall any possible emergency shortage, would give rise to greater fuel competition in the state with its attendant public advantages, would aid in the economic development of the state by stimulating industry and otherwise, and would help meet the growing fuel demands of the burgeoning Florida population." (R. 20418)

verted. If such evidentiary matters are not controverted by Petitioner, and the necessary statutory ultimate findings made by Respondent, are based upon a record which amply supports those findings with substantial evidence, then Section 19(b) of the Act becomes the applicable statutory law governing any review since

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

After discussing in detail in Opinion 301 all these necessary elements for the issuance of a certificate of public convenience and necessity, Respondent made the ultimate statutory findings required by the Natural Gas Act (R. 20437-20438)

The Respondent also found on the basis of uncontroverted evidence that Florida is a "fuel have-not area" and is almost entirely dependent upon imported energy. Indeed, peninsular Florida is at the mercy of a fuel oil monopoly.[11]

Despite Petitioner's implications to the contrary, there is no language in the Natural Gas Act which requires or

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[11] Respondent found:

"Notwithstanding the relatively close proximity of the gas fields and the demonstrated benefits to the public which flow from the introduction of natural gas into an area, natural gas has been slow in coming to peninsular Florida—although it has today reached every other state in the nation of comparable size and importance." (R. 20412)

* * * * *

"On the one hand there is unmistakably a real desire and need for natural gas on the part of Florida markets. Florida is a fuel have-not area of the nation, possessing practically no native usable energy supplies. Although it has a growing population and a considerable industrial potential, it is almost entirely dependent on imported energy to meet its domestic, industrial and power generating requirements. Florida's dependency on imports consisting chiefly of petroleum products brought in by tanker and barge makes its economy vulnerable to interruptions of this single source of supply and is moreover undesirable from the competitive standpoint. Supplies of gas are available, however, in reasonably accessible gas fields and terrain features are favorable to the construction and operation of natural gas pipeline facilities for carrying gas to Florida." (R. 20415)

even contemplates any protection to Petitioner's competing fuel monopoly. The Act requires only that an applicant be qualified, willing and able to perform the service proposed and that this service be required by the present and future public convenience and necessity. The Respondent has so found.[12]

These elements of the applicants' ability and the proposed contributions to the public interest have been regarded by the courts as the controlling factors to be considered by the Commission in the grant or denial of certificates of public convenience and necessity. The fact that competition may result in no way affects the validity of this proposition.

In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 83 App. D.C. 297, 169 F. 2d 881 (C.A.D.C. 1948), *cert. denied,* 335 U.S. 854, 69 Sup. Ct. 81 (1948), this Court reviewed an order of the Respondent authorizing a pipeline to be constructed from Texas to Michigan. Although Michigan already enjoyed natural gas service from another pipeline, Respondent found that a substantial demand for service existed in Wisconsin and Michigan and that for the first time a large segment of the population would secure the benefits to be derived from the introduction of natural gas service in the area sought to be served. Opinion No. 301 is even stronger than that opinion because peninsular Florida does not enjoy natural gas at all and the population area to be served does not even have a competing pipeline company. Panhandle, the competitor to Michigan-Wisconsin, raised questions similar to those raised by Petitioner in this review. These intervenors feel the *Panhandle Eastern* case, *supra,* is determinative authority for

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12 Under its theory of "unfair competition" (Pet. Br. 42), Petitioner would forever bar the public of Florida from natural gas benefits. The desire and the demand for natural gas, the *public market* rather than protection of a *private market,* warrants the consideration of Respondent under the Natural Gas Act.

disposing of this petition for review. The Court in that case said:

> "* * * nothing in the natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply. No such privilege can be reconciled with the general mandate in § 7(e) of the Natural Gas Act that *'a certificate shall be issued to any qualified applicant * * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed * * * and that the proposed service * * * is or will be required by the present or future public convenience and necessity'* ". (Emphasis supplied)

As shown by the above quoted case it is the principle of public convenience and necessity which is paramount to the interest of competing fuels. The evidence before Respondent was uncontroverted that the public convenience and necessity required the issuance of the certificates. Such a finding is conclusive and should not be overturned for in *Arkansas Louisiana Gas Co.* v. *Federal Power Commission,* 113 F. 2d 281 (C.A. 5th 1940), the Court held in sustaining the Federal Power Commission's finding of public convenience and necessity and the grant of a certificate of public convenience and necessity to construct a pipeline that:

> "the evidence shows that the construction will serve communities not now adequately served, and it is for the commission and not for us to say, upon the evidence in the record, whether that service will meet the present and future convenience and necessities of the public of that section."

See also *Department of Conservation* v. *Federal Power Commission,* 148 F. 2d 746 (C.A. 5th 1945), where the Court said:

> "Normally it is for the commission to draw the conclusion that the present or future public convenience

and necessity either requires or does not require the granting of a certificate. Normally an order granting a certificate may be set aside only when the evidence admits of but one conclusion, that its granting will not serve public convenience and necessity, or that the applicant is not in a position to supply the need. *Inferior and superior uses aside, the evidence in this case leaves in no doubt that there was a public need.* It fully supports the finding, too, that the applicant has contracts which put it in a position to fully supply that need." (Emphasis supplied.) See also, *Kentucky Natural Gas Corp.* v. *Federal Power Commission,* 159 F. 2d 215 (C.A. 6th 1947); *Cia Mexicana de Gas* v. *Federal Power Commission,* 167 F. 2d 804 (C.A. 5th 1948); *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494 (C.A. 3d 1953).

The certificates issued by the Respondent on the basis of its ultimate findings contained conditions imposed for the principal purpose of stabilizing the revenues, and eliminating preferences of the proposed rates of the applicants, thereby enhancing the economic feasibility of the projects. These conditions in no way modified any basic characteristic of the projects.[13] These conditions did not result in a decrease in the volume of gas to be made available in Florida; they did not curtail the number of customers to be served, nor did they restrict the area of the state where service is to be rendered. Furthermore, the conditions resulted in no change in the rates for sales of natural gas to the firm resale customers—that class of purchasers which serves the general consuming public in Florida.

The evidence before Respondent, covering more than 8,100 pages of testimony and including some 322 exhibits, was sufficient to enable the Respondent to formulate the just and reasonable conditions which it imposed. *Interstate Power Company et al.* v. *Federal Power Commission,* 236 F. 2d 372, 385 (C.A. 8th 1956). Moreover, Petitioner

[13] As distinguished from the factual situation involved in *McClatchy Broadcasting Company* v. *Federal Communications Commission,* 99 App. D.C. 199, 239 F. 2d 19 (C.A.D.C. 1956), *cert. denied,* 353 U.S. 918 (1956).

itself assisted in the formulation of these very conditions by developing upon the record much of the basic evidentiary material and policy considerations upon which the conditions were imposed. In these circumstances Petitioner should not be permitted to contend that the conditions imposed resulted in any "change" or "new" project as to which Petitioner was not heard. (R. 7663-7665; 7701-7702; 7704; 7583-7584; 6493-6494)

Even if Petitioner were not so precluded by its own action in this proceeding, it is not in a position to complain. For, as the Court said in the *Arkansas Louisiana Gas* case, *supra:*

> "Finally, we find nothing in the statute which prevents the commission from imposing in the interest of the public to be served by the construction, reasonable conditions upon the granting of a certificate of convenience and necessity and we cannot agree with petitioner that their imposition in any manner affects or impairs the certificate.
>
> "But, if we could abstractly agree, this would not avail petitioner, for it is aggrieved, not by the imposed conditions, but by the granting of the permit, and under the statute, it may complain here only of an order by which it is aggrieved." [14]

If Petitioner were aggrieved at all, it was aggrieved by the issuance of the certificate, not by the conditions attached to the certificate. Once the Commission rightfully found that a certificate should be issued, Petitioner's interest in this proceeding was terminated.

Additionally, in the *Panhandle Eastern* case, *supra,* Panhandle (as does Petitioner in this case) questioned rate and financial conditions attached to the certificate issued to Michigan-Wisconsin Pipeline Company. The Court said that Section 7(e) of the Act expressly authorizes the Com-

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[14] In 1940, when this case was decided, the statute contained no express grant of authority to impose conditions. (Act of February 7, 1942, C. 49, 56 Stat. 83, U.S.C. Title 15, Sec. 717f) expressly authorized the imposition of reasonable terms and conditions to the issuance of certificates by Respondent.

mission to attach reasonable conditions and that the condition that Michigan-Wisconsin shall obtain approval of its financial plan by the Securities and Exchange Commission was both "practical and legal".

Since 1942 Respondent has had statutory conditioning power. The only limitation on such power is that the conditions imposed be reasonable. In this case Respondent's conditions meet this test. Petitioner's contention that it should be afforded a hearing to test the "applicants' ability and willingness to comply" (Pet. Br. 24) is without basis because the filings submitted by applicants and accepted by Respondent disposed of the matter. This is because the propriety of the conditions was a matter solely between Respondent and the applicants. A fuel oil competitor is not the proper party to test reasonable conditions imposed by a regulatory agency subsequent to its making the findings required by Section 7(e) of the Natural Gas Act for the issuance of certificates.

III

PETITIONER WAS GRANTED PROCEDURAL DUE PROCESS ALTHOUGH RESPONDENT SCHEDULED BRIEFING DATES AND ORAL ARGUMENT WITHIN A RELATIVELY SHORT PERIOD OF THE END OF THE HEARING, OMITTED THE INTERMEDIATE DECISION PROCEDURE AND ISSUED CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY WITHOUT A SPECIAL HEARING FOR A COMPETING FUEL INTEREST TO TEST COMPLIANCE BY APPLICANTS WITH THE IMPOSED CONDITIONS

These intervenors are of the opinion that both foregoing sections of their brief are dispositive of the entire petition for review. However, exercising the utmost of caution we shall respond to the Petitioner's procedural due process contentions raised on pages 14 to 33 of its brief.

A. Petitioner Had Adequate Time to Present Its Case to the Respondent and the Respondent Took Adequate Time Considering the Merits of the Applications

Petitioner, through its counsel, was present daily during the entire course of the hearing and had full opportunity to participate in every phase of this case. The record shows that Petitioner fully availed itself of this opportunity.

Petitioner now complains to this Court that there was insufficient time between the date that the hearing was adjourned and the due date of its brief for Petitioner adequately to prepare its presentation for the Commission's consideration. Having been present throughout the hearing, Petitioner was well aware (as the hearings became more protracted) that the issuance of certificates to Coastal and Houston on or before December 31, 1956, was imperative if the projects were not to fail and the people of Florida were to receive natural gas. In view of the fact Petitioner did not have the burden of proof in this case and had only a limited sphere of interest in this proceeding, the time given by the Commission for the filing of its brief was ample.[15]

In its brief Petitioner attempts to infer that the Commission did not have sufficient and adequate time to review this case. Such inference is unfounded.[16] Petitioner has answered its own argument by citing the length of Respondent's opinion. With its own experience in the field

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[15] While Petitioner's brief was due on December 15 this was a Saturday and under the Commission's Rules of Practice and Procedure, Rule No. 1.13, Petitioner had until Monday, December 17, in which to file its brief.

[16] "The Florida Economic Advisory Council and the railroads also argue that the Commission's decision was reached so quickly that the Commission had insufficient time to consider the case fully and with due deliberation. *Thus in this case we encounter the novel situation of parties complaining not of administrative delay but of administrative dispatch. However, we find the complaints unjustified, if unusual.* One of the premier attributes of the administrative agency has been its flexibility and capacity for expeditious action, when the circumstances require. There is no need to detail the special actions taken in this case to insure that, consistent with a proper consideration of the case, as prompt a decision as possible be reached. It is sufficient that we are satisfied that this case received consideration as full and careful as it would if dealt with on a routine basis." (Emphasis supplied). (R. 20907)

of natural gas, with the large staff of experts to render assistance and with the briefs of all the parties to serve as guides, there was ample opportunity for the Respondent to render a thoughtful and considered opinion. An analysis of this opinion shows beyond any doubt that all important details of the applications, the exhibits and testimony were considered by Respondent. If this were not true, it is difficult to rationalize how the Commission could have included in its opinion and order those very conditions which were the subject matter of considerable controversy during the proceeding.

B. After Issuance of Respondent's Opinion 301 and Accompanying Order a Further Hearing Was Not Necessary

After reviewing all the evidence, Respondent in Opinion 301 found that the statutory requirements for certificates of public convenience and necessity had been satisfied. There were, however, certain aspects of the proposed projects which the Respondent believed should be corrected. In order that this objective might be obtained the Respondent inserted in its order certain conditions.[17]

Petitioner asserts that these conditions resulted in such a different project from the proposals developed at the

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[17] Respondent in its February 21, 1957 order discussed Petitioner's contention that the project was materially changed:

> "No change has been made in the sources of gas supply, the construction or route of the joint pipeline, the volumes of gas to be transported or the customers and markets to be served; nor is there changed the system of contractural relationships by which Coastal purchases approximately 100,000 Mcf per day from the producers, sells it to Houston Gas, which in turn sells it to the industrial and resale customers in Florida and by which Coastal and Houston Gas transports some 150,000 Mcf per day for the account of Florida Power & Light and Florida Power. The requirements that Coastal's rate of return be based on the overall rate of return of the two companies for an indefinite rather than a limited period, that the rates of Houston Gas be commensurate with the cost of service, and that the cancellation provisions be eliminated from the transportation agreements, *do not create a project so different that the requirements of law need be enlarged upon and the hearing transcript of some 8,000 pages be extended, particularly in view of the countervailing considerations of the public convenience and necessity set forth in our opinion.* The same would apply to our requirements with respect to the capital ratios in financing the project and the treatment of the interim notes, which by our order may remain outstanding as long as dividends are not paid on the common stock." (Emphasis supplied.) (R. 20905)

hearings that an order should have been entered denying the applications without prejudice to new applications being filed in conformity with the Respondent's order and that a hearing *de novo* be required or, at least, a further hearing should have been held in order that Petitioner might have the right to test in open hearing, for its own self-serving purposes, whether there had been a compliance by the applicants with the Respondent's order. Petitioner is in no position to complain that it was unaware that conditions might be attached. The Courts have rejected such complaints. *State Airlines, Inc.* v. *Civil Aeronautics Board,* 338 U.S. 572, 20 S. Ct. 379, 94 L. ed. 353 (1950); *Interstate Power Company* v. *Federal Power Commission, supra; City of Dallas* v. *Civil Aeronautics Board,* 94 App. D.C. 195, 221 F. 2d 501 (C.A.D.C. 1954), *cert. denied,* 348 U.S. 914 (1954).

These intervenors are at a loss to understand on what basis the Petitioner believes it has the right to test the applicants' compliance with the Respondent's order. These conditions related only to administrative matters and were plainly within the Respondent's expert competency. When the Commission found that the public convenience and necessity required the issuance of the certificates, even though there might be some economic hardship upon Petitioner, Petitioner's interest in this proceeding was terminated. The Natural Gas Act guaranteed it a hearing. Petitioner had taken full advantage of this right but when its interest was held to have been surpassed by the urgent need of the people of Florida for natural gas, its administrative remedy was completed. The conditions attached to the issuance of the certificates to the applicants and to the exercise of the rights granted thereunder are merely conditions which control the method by which Houston and Coastal were to construct and operate their projects.[18] They are

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[18] Section 19(a) of the Act provides:

"Upon such application the Commission shall have power to grant or deny rehearing or to abrogate *or modify its order without further hearing.*" (Emphasis supplied)

conditions subsequent. *Panhandle Eastern Pipeline Company* v. *Federal Power Commission, supra; Skelly Oil Company* v. *Phillips Petroleum Company,* 174 F. 2d 89 (C.A. 10th 1949). Respondent was competent to review the submissions of applicants to ascertain whether they met the requisites which it had found to be required by the public convenience and necessity. Respondent was not undertaking to determine again the requirements of public convenience and necessity, for, as a result of the hearings, this had already been determined. Since its function in reviewing the submissions was administrative only, there was no requirement for a hearing.[19]

Under Petitioner's position, Respondent, and every other administrative agency to whom is entrusted judgment and discretion, would automatically be removed from exercising administrative decision.

As to Petitioner's alleged lack of a hearing on the conditions prescribed, *Interstate Power Company* v. *Federal Power Commission, supra,* is dispositive of Petitioner's contention. In that case petitioners, like Petitioner, here, contended that Respondent's rejection of proposals submitted in hearing and its adoption without notice of proposals not presented in hearing deprived Petitioners of due process. The Court held:

> "The petitioners contend that when the Commission decided to reject the several defined zones which were proposed and opposed on the hearing before the Trial Examiner, it should have given notice and held a hearing in respect to the particular zone lines which it contemplated establishing. They argue that they were denied due process in this respect.
>
> "It cannot be denied that the course contended for would have been held appropriate if the Commission had followed it, but we do not find a denial of due

[19] Petitioner places considerable reliance upon *Public Utility District No. 1* v. *Federal Power Commission,* 242 F. 2d 672 (C.A. 9th 1957). This case is distinguishable on several grounds, the one most relevant here being that there was no hearing at all in the *Public Utility District No. 1 Case.*

process in the course that was followed. The Commission is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess'. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456. It has been delegated by the Congress to administer the Natural Gas Act with power 'to draw inferences from [the facts].' Its 'function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment'. United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236, 241, 66 S.Ct. 75, 77, 90 L.Ed. 38, and particularly its findings and directives need not be based directly on the expressed opinion of experts, but may be drawn from the facts. Market Street Ry. Co. v. Railroad Commission, 324 U.S. 548, 559, 560, 65 S.Ct. 770, 89 L.Ed. 1171.

* * * * *

"But the conclusion arrived at by the Commission, after considering all the contentions, was that none of these factors nor all together sufficed to overcome the evidence that it was the distance which determined the relative cost of transmitting the gas to the delivery points of the system; and that the cost increased and lessened in direct proportion to the distance. That conclusion was within the province of the Commission."

If Respondent can—as the Court in the *Interstate case* held—impose zone rates other than those presented at the hearing, it can condition the exercise of authority under certificates in a manner that is reasonably dictated by facts before it and inferences based thereon by its expert judgment.

C. The Omission of the Intermediate Decision Procedure Was Proper Under the Circumstances

On November 14, 1956, two weeks before the hearing closed, Houston and Coastal moved, pursuant to the Commission's Rules of Practice and Procedure, that the intermediate decision procedure be omitted and that the Commission itself decide the case directly. In support of their motion Houston and Coastal reiterated that all of Coastal's gas supply contracts contained provisions for cancellation if Coastal had not received a certificate of public convenience and necessity from Respondent on or before December 31, 1956. Exercise of these options by the producers would have withdrawn Coastal's supply of natural gas and the projects would have failed. On the basis of this showing Respondent granted the motion and stated:

> "The record reveals that the gas purchase contracts are subject to cancellation on the grounds asserted by Houston and Coastal. Of paramount interest, however, is the interest of the public in Florida as represented by officials of the State of Florida, the Florida Railroad and Public Utilities Commission, the Orlando Utilities Commission, and many municipalities interested in natural gas for the State of Florida." (R. 20337)

Section 8(a) of the Administrative Procedure Act, (60 Stat. 242, 5 U.S.C. 1007(a)) provides that initial decisions on applications for initial licenses

> "may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." [20]

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[20] Respondent's order omitting the intermediate decision procedure stated as follows:

> "(2) Upon the basis of the entire record, due and timely execution of its functions imperatively and unavoidably requires that the Commission omit the intermediate decision procedure and render final decision in the proceeding."

Then the Commission ordered:

> "(A) The intermediate decision procedure in the proceedings herein be and the same is hereby omitted in accordance with the provisions of Section 1.30(c) [18 C.F.R. 1.30(c)] of the Commission's Rules of Practice and Procedure." (R. 20338)

The only case cited by Petitioner in its brief which is even remotely connected to this issue is *Channel 16 of Rhode Island* v. *Federal Communications Commission,* 97 U.S. App. D.C. 179, 229 F. 2d 520 (C.A.D.C. 1956) involving a television station application. The Federal Communications Commission did not find upon the record that due and timely execution of its functions imperatively and unavoidably required that the record be certified to it for initial or final decision. That case was remanded by this Court:

> "Because of this failure of the Commission to observe statutory procedure, it is necessary for us to hold its action in this case unlawful and to set it aside for that reason alone, without reaching other reasons for reversal advanced by appellant."

A more applicable case is *RCA Communications, Inc.* v. *Federal Communications Commission,* 99 App. D.C. 163, 238 F. 2d 24 (C.A.D.C. 1956), where RCA attacked the decision of the Federal Communications Commission because the intermediate decision procedure had been omitted. In denying that Petitioner's contention this Court said:

> "It is unnecessary for us to decide this procedural point, because the commission made a finding upon the record that due and timely execution of its functions required that the record be certified to it by the hearing examiner without preparation of an initial or recommended decision."

See also *Kenny* v. *United States,* 103 F. Supp. 971 (D.C. N.J. 1952).

The cases cited by Petitioner at pages 17 and 19 of its brief in support of its position have been examined and are not only clearly distinguishable but are also irrelevant.[21]

The omission of the intermediate decision was warranted because Respondent made the requisite statutory finding predicated upon unchallenged evidence in the record. The fact that Petitioner disagrees with the Commission's judgment on this matter is immaterial for, so long as the Commission's action is not arbitrary, its decision on this procedural point will not be reversed. See *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission, supra; Colorado Interstate Gas Co.* v. *Federal Power Commission,* 209 F. 2d (10th 1954).

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21 *Universal Camera Corp.* v. *National L. R. Bd.*, 340 U.S. 474, 494, 74 S. Ct. 456, 95 L. Ed. 456 (1951); and *Utica Observer-Dispatch* v. *National Labor Relations Bd.*, 229 F. 2d 575 (C.A. 2d 1956) cited on page 19 of Petitioner's Brief are not authority for the question raised by Petitioner because those cases on charges of unfair labor practices hold that the hearing officer's report is a part of the record and must be given due weight both by the agency and the Court. Omission of the intermediate decision was not involved in *Universal Camera* case, supra, but rejection of the examiner's findings and failure to consider them by the Labor Board. *Ramspeck* v. *Federal Trial Examiners,* 345 U.S. 128, 73 S. Ct. 570, 97 L. Ed. 872 (1953) involved tenure, compensation and rotation of hearing examiners under Civil Service rules and does not bear on the point raised by Petitioner. *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1949), did not involve omission of intermediate procedure.

CONCLUSION

The basic question before Respondent was whether the projects of Houston and Coastal should be certificated or whether the consuming public of Florida should be denied the benefits of natural gas. Petitioner has subjected Houston and Coastal to a great amount of delay in finalizing the inception of natural gas into peninsular Florida. By such delay Petitioner has maintained its fuel oil monopoly to the detriment of the public of Florida.

It is submitted that the orders of the Federal Power Commission herein under review should be affirmed to avoid further delay in natural gas coming to Florida.

Respectfully submitted,

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APPENDIX

Administrative Procedure Act:

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by Subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires. [Act of June 11, 1946, c. 32, 60 Stat. 237, Title 5, U.S.C. 1007(a)]

Natural Gas Act:

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or ex-

tension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. Sec. 717f(c)]

* * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. Sec. 717f(e)]

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall applly to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting

aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. [June 21, 1938, c. 556; § 19, 52 Stat. 831; Title 15, U. S. C. § 717r.]

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13833, 13952

FLORIDA ECONOMIC ADVISORY COUNCIL, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

COASTAL TRANSMISSION CORPORATION, HOUSTON TEXAS GAS AND OIL CORPORATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION AND FLORIDA DEVELOPMENT COMMISSION, INTERVENORS

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

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United States Court of Appeals
For the
District of Columbia Circuit

FILED SEP 13 1957

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CLERK

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In the Commission's opinion the questions are:

I. Whether the issuance of the conditioned certificate of public convenience and necessity for a natural gas pipeline system was supported by findings and record and otherwise lawful with respect to:

A. Economic feasibility.

B. Rates for proposed services.

1. Relation of rates for transportation of gas to rates for other services.

2. Relation of transportation rates to competitive fuel oil prices.

3. Allocation of demand costs in formula rate.

4. Minimum bill clauses.

5. Cancellation clauses.

C. Scope of inquiry into gas suppliers' sales and rates.

D. Consideration of anti-trust law policy.

II. Whether the procedures followed to reach a decision one month after hearing closed were lawful with respect to:

A. Omission of intermediate decision.

B. Issuance of certificate conditioned for correction of deficiencies, instead of denial.

C. Modification of certificate on applications for rehearing without second hearing.

D. Sufficiency of time allowed for briefs and Commission consideration.

E. Refusal to permit filing of (1) answer to application for rehearing; (2) second application for rehearing.

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COUNTER-STATEMENT OF THE CASE

These petitions for review of Federal Power Commission orders [1] which issued conditioned certificates of public convenience and necessity for a natural gas pipeline system to carry gas to points throughout Florida, are brought by Florida Economic Advisory Council, a private association describing itself as representing the petroleum industry in Florida (R. 17662) and composed of water and highway carriers, marketers, distributors, and retailers of petroleum and petroleum products (R. 17661).

The orders complained of.—The orders complained of were entered in consolidated proceedings on applications by Houston Gas and Oil Corporation (Houston Gas) and Coastal Transmission Corporation (Coastal) [2] pursuant to Section 7 of the Natural Gas Act.

The first order under review in No. 13833, with accompanying Opinion No. 301 (R. 20405–20449), was issued December 28, 1956. It granted certificates upon a number of specified conditions (R. 20439–20440) which were designed to correct deficiencies in the proposals submitted.

The second order under review in No. 13833, was issued February 21, 1957 (R. 20897–20912). It accepted certain rate filings made in compliance with conditions of the first order; rejected certain service agreements as not being in compliance with such conditions; modified the order of December 28, 1956, in certain respects; denied applications for rehearing filed by petitioner among others; and denied an appeal from a rejection by the Commission's Secretary of an "answer" tendered by petitioner and another party to Houston Gas' application for rehearing (R. 20909–20910).

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[1] The petitions are brought under Section 19 (b) of the Natural Gas Act. That Act is the Act of June 21, 1938, c. 556, 52 Stat. 821–833, 15 U.S.C. §§ 717–717w, as amended. Copies of the Act will be lodged with the Clerk.

[2] The application of Houston Gas (R. 14657) was filed August 26, 1955, with amendments and supplements October 27, 1955, and February 10, 16 and 24, 1956 (R. 15822, 16996, 17455, 17525) (F. P. C. Docket No. G–9262); that of Coastal (R. 15835), on February 8, 1956 (F. P. C. Docket No. G–9960).

The order sought to be reviewed in No. 13,952 was issued April 18, 1957 (No. 13952, R. 86–87).[3] It denied an appeal by petitioner from the rejection by the Commission's Secretary of a second application for rehearing tendered March 25, 1957 (No. 13952 R. 59).

The pipeline system.—The applications of Houston Gas and Coastal proposed a joint project for supplying gas to peninsular Florida, the last state in the country of comparable size and importance without natural gas. Coastal's portion is to extend from sources of supply in Texas and Louisiana to the east bank of the Mississippi River; Houston Gas' portion, thence to markets in Florida. The project is described in the Commission's Opinion (R. 20413–20414) as follows:

Coastal proposes to construct and operate a natural-gas pipeline system with a main line approximately 574 miles in length, extending from a point in Hidalgo County, Texas, near McAllen, to a point just east of the Mississippi River in East Baton Rouge Parish, Louisiana, approximately six miles north of the City of Baton Rouge. Coastal also proposes to construct and operate a number of supply lateral lines, with a total length of approximately 414 miles, extending off its main line in Texas and Louisiana to some 42 production fields in those states. In addition, Coastal proposes to construct and operate four main-line compressor stations with a total of 16,500 installed horsepower. The total required capitalization for Coastal's project is estimated at $54,589,000.

Houston Gas proposes to construct and operate a natural-gas pipeline system approximately 942.6 miles long in its furthest reach. The company's system would begin at the point on the east bank of the Mississippi River where Coastal proposes to make deliveries to it, and proceeding across the coastal regions of Louisiana, Mississippi and Alabama, and thence eastwardly across the Florida panhandle, its facilities would proceed southwardly to a terminus at Cutler, south of Miami in Dade County, Florida. The western portion of this line would follow a route accessible to some of the gas-producing areas of

[3] Citations to the record in No. 13833 will be made as "R. 000"; to the record in No. 13952 as "No. 13952 R. 00". These are references to the records as paged in the certification of the transcripts.

Louisiana and Mississippi. Houston Gas also proposes to construct and operate approximately 682 miles of lateral lines within the State of Florida * * * to serve 34 distributors and 17 industrial users in the state. In addition, Houston Gas proposes to construct and operate four main-line compressor stations, each having 6,000 installed horsepower. The total cost of facilities for this project is estimated at $94,285,000.

Under the parties' present proposals, Coastal would initially constitute Houston Gas' sole source of supply and the latter in turn would constitute Coastal's sole market. By means of its above-described facilities, Coastal proposes to transport and deliver to Houston Gas on a cost-of-service basis an initial average volume of 248,642 Mcf of gas per day with an initial daily maximum of 273,506 Mcf. Third year average and peak day volumes would be the same.[4] A large part of these volumes—some 100,000 Mcf per day average—would be purchased by Coastal in the gas fields under contracts with producers, and would be transported and delivered to Houston Gas for transportation and resale by the latter to Florida markets.

However, a substantial part of the foregoing volumes—some 150,000 Mcf per day average—would consist of "transportation" gas, that is gas delivered to two large Florida power companies for use as boiler fuel in generating electricity. This gas transportation arrangement is a distinguishing feature of applicants' proposals. Under it, gas is purchased by the power companies, Florida Power & Light Company (Florida Power & Light) and Florida Power Corporation (Florida Power) in producing fields in Texas and Louisiana. Received initially by Coastal, it is transported by Coastal and Houston Gas successively for a charge to its delivery point to the power companies in Florida. Houston Gas is, under contracts with the power companies, responsible for the deliveries of this transportation gas and receives payment from the power companies for this service, in turn compensating Coastal for Coastal's part in rendering this service.

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[4] On the 14.73 psia basis customarily used by the Commission. These volumes are 250,000 Mcf and 275,000 Mcf per day respectively on a 14.65 psia base. However, applicants propose to transport 278,000 Mcf per day if required, under certain peak load conditions.

As mentioned, under the parties' present proposals, Houston Gas would constitute Coastal's sole market, purchasing and receiving for transportation respectively, the foregoing respective volumes. Houston Gas would transport this gas to Florida for delivery to its three categories of customers: resale customers, direct industrial customers, and the two power companies which would receive the transportation service referred to above. Houston Gas proposes five classes of service for these three categories of customers. * * * [B]oth firm and preferred interruptible and primary interruptible service is proposed for direct industrial customers. The transportation service would be on a firm basis.

Proceedings before the Commission.—The Commission on June 21, 1956 issued an order consolidating the proceedings on both applications, granting intervention to a number of interested parties, including Florida Economic Advisory Council, petitioner herein, and setting hearing (R. 18020). The New York Public Service Commission and the Florida Railroad and Public Utilities Commission filed notices of intervention, and became parties to the proceedings. Numerous other persons sought leave to intervene, and were either denied intervention or granted limited participation.

Hearings were commenced on July 9, 1956, and continued, with the exception of periods of recess, until November 28, 1956. During the course of the hearing (November 14, 1956) Coastal and Houston Gas orally moved upon the record that the intermediate decision procedure be waived and omitted pursuant to the provisions of Section 1.30 (c) of the Commission's Rules of Practice and Procedure, and that the Commission, in lieu of any intermediate decision by the presiding examiner, render the final decision in the consolidated proceedings (R. 6593). Staff counsel and all parties of record present concurred in the motion, with the exception of counsel for Green's Fuel, Inc., Florida Economic Advisory Council, Natural Gas Company of Florida, Florida Liquefied Petroleum Gas Association and Atlantic Coast Line Railroad Company (R. 6599–6608, 6663–6678). The presiding examiner fixed December 5, 1956, as the date for filing of briefs by Houston Gas, Coastal, and supporting interveners; December 10, 1956, as the date for the brief of

staff counsel; December 20, 1956, as the date for the brief of opposing interveners; and December 27, 1956, as the date for answering briefs of Houston Gas and Coastal (R. 8089–8106).

The motion for omission of the intermediate decision procedure was granted by an order of the Commission (R. 20337–20338) issued December 6, 1956, upon the following findings:

> (1) The record shows that unless final action is taken by the Commission prior to December 31, 1956, the gas purchase contracts of Coastal will be subject to cancellation, and unless the intermediate decision procedure is omitted, it appears that a decision by the Commission cannot be rendered before December 31, 1956.
>
> (2) Upon the basis of the entire record, due and timely execution of its functions imperatively and unavoidably requires that the Commission omit the intermediate decision procedure and render final decision in the proceedings.

By the same order the Commission advanced the dates for opposing interveners' briefs, including petitioner's, to December, 15, and applicants' reply briefs to December 20.

By a subsequent order of December 13, 1956 (R. 20355–20356), the Commission denied a motion by opposing interveners, including petitioner, to postpone the date for their briefs to December 20 but granted their requests for oral argument, which was held December 21, 1956, and took most of the day (R. 20356, 8165, 8203, 8204, 8253, 8285). Petitioner filed a brief of 33 pages and participated in the oral argument (R. 8219–8229).

The Commission's Opinion 301 and order issued December 28, 1956 (R. 20405–20449), granted a certificate upon conditions which it prescribed with particularity for correction of the deficiencies it had found in the applications. They may be summarized as including the following (R. 20439–20440):

> B. Revised rate schedules and contracts to be filed by Houston Gas as follows:
>
> (1) Rates for each service to be commensurate with its cost, allocated in accordance with usual Commission

standards and based on a rate of return not in excess of 6%.

(2) Cancellation clauses to be eliminated.

(3) Minimum bill provisions to be modified so as to be based, at least in part, upon demand, and on a monthly rather than an annual basis.

C. Revised tariff to be filed by Coastal as follows:

(1) To provide a cost of service formula rate for charging Houston Gas.

(2) To provide separate charges for sale of gas to Houston Gas and for transportation of power companies' gas, allocated in accordance with usual Commission standards.

(3) To be based on 6% rate of return, and after first six months on an overall rate of return of both companies for the preceding six months of not more than 6%.

(4) Working capital to be offset by income tax accruals at 50% of annual tax.

(5) and (6) Certain adjustment provisions found objectionable to be eliminated.

D. A satisfactory financing plan to be submitted in advance for approval before being put into effiect—providing for at least 15% equity, and not over 75% debt, and any interim notes to be outstanding only as long as no dividends are paid on common.

Applications for rehearing were filed by Houston Gas and opposing interveners (R. 20623, 20735, 20776). Applicants also made filings in response to the conditions, and, in the application of Houston Gas for rehearing, it asked for modifications of the original conditions in certain respects in which it had not fully complied with the conditions (R. 20623–20633). Petitioner tendered an "answer" to Houston Gas' application for rehearing which the Commission's Secretary by letter dated February 6, 1957, rejected, advising that it was "not acceptable because there is no provision in the Commission's rules for the filing of answers to applications for rehearing" (R. 20852). On February 12, 1957, petitioner filed an appeal from that action of the Secretary (R. 20878).

The Commission's order of February 21, 1957, followed and, rehearing having thereby been denied, the petition for review of the December 28, 1956, order was timely filed in No. 13833, April 22, 1957, within 60 days of the order of February 21.

Thereafter an application for a further rehearing was filed by petitioner on March 25, 1957 (No. 13952 R. 59), which was rejected by the Commission's Secretary by a letter dated March 29, 1957 (No. 13952 R. 79). On April 4, 1957, petitioner filed an appeal from this action and on April 18, 1957 (No. 13952 R. 86), the Commission issued an order denying appeal. The petition in No. 13952 was filed June 17, 1957, within 60 days of April 18, 1957.

On March 22, 1957, Houston Gas and Coastal accepted the certificates of public convenience and necessity (No. 13952 R. 54–58).

SUMMARY OF ARGUMENT

I

A. The Commission's finding of economic feasibility of the project was not erroneous because of any "illusion" that the project had unused capacity permitting future increase in revenues from increased volumes. The claimed "illusion" exists only in petitioner's failure to read the Commission's opinion properly. The possibility of increased revenues which the Commission found to exist is supported by the record.

B. The Commission's action has satisfied all valid objections to applicants' rates:

(1) Petitioner's claim that rates for transportation service and for interruptible gas service are still in imbalance is based solely upon a misreading of the Commission's discussion in Opinion 301 of figures relating to the costs of those services.

(2) The Commission's original objections to the tying of natural gas transportation rates to competing fuel oil prices, instead of cost, have been fully met by the revised transportation rates based on costs. The concommitant non-jurisdictional charges by producers for the "transportation gas" sold to power companies reflect and contain the only tie still retained.

(3) A fault in allocation of costs in Coastal's formula rate charged Houston Gas which was filed in response to Opinion 301, as pointed out in the order of February 21, was that in the allocation of demand costs on a contract demand basis without taking into account the fact that the contract right of curtailment in transportation service on peak days may in fact not be exercised, was corrected by the condition imposed by the February 21 order.

(4) The Commission's modification in its original condition with respect to minimum bill clauses is clearly supported by its further findings on rehearing, as to which no question of adequacy of record support is raised. Change in findings does not make them suspect, the question still being as to the adequacy of the record support. *Cia Mexicana De Gas, S.A.* v. *F.P.C.*, 167 F. 2d 804, 806 (CA5).

(5) Similar considerations apply to the Commission's withdrawal of its original requirement for elimination of cancellation clauses as to one class of service, comprising 3% of the business, after the condition had been complied with as to the transportation service, comprising 60% of the business.

C. The Commission properly refrained from further inquiry into suppliers' sales:

(1) The rates charged by Coastal's suppliers are not even alleged to be unlawful and any posibility they may hereafter be subject to increase if found too low in proceedings under the rate sections of the Act will not prejudice the public interest in the economic feasibility of this project, under the rule of *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355. The possibility that they may be too high, with no possibility of retroactive refund to purchasers, presents a dilemma which was within the Commission's administrative judgment to resolve, i. e.: Is it better for the State of Florida to have gas service and wait for a rate reduction which is a mere theoretical possibility not supported by any evidence, or to go on waiting for gas service? *City of Pittsburgh* v. *F.P.C.*, 99 USAppDC 113, 237 F. 2d 741, 752, involved a possible increase in cost caused by the certification and not correctible by future rate regulation, as would be true here.

(2) The resolution of any question as to the Commission's lack of jurisdiction over the sales by the power companies' suppliers, which it is claimed might trigger suppliers' cancellations (with resulting loss of business) is not necessary to the determination of economic feasibility of the project. The claimed basis of jurisdiction would arise only from an exercise by Houston Gas of an alleged option to take so-called "make-up" gas, and the contract and the uncontroverted testimony are plain that there is no such option. In any event the abandonment provisions of Section 7 (b) of the Act offer ample protection against the claimed hazard to the economic feasibility of the project.

D. The Commission's Opinion 301 on its face makes plain the error of petitioner's charge that the Commision had failed to take into account the policy of the anti-trust and fair trade laws. The pricing provisions objected to will in fact introduce competition into the heretofore protected Florida market for fuel oil. The prices provided in the related nonjurisdictional sales of gas by producers to the power companies are the result of the operation of a free national market for gas, not an effort to restrict freedom of the market on this record. Moreover, previous investigations by the Power Commission on complaints by the Public Service Commission of Georgia have suggested that Florida Power should attempt to reduce its fuel costs, as it will by this arrangement.

II

A. The record amply supports the findings made by the Commission in accord with the admittedly applicable provision of Section 8 (a) of the Administrative Procedure Act for the omission of the intermediate decision procedure. *Colorado Interstate Gas Co.* v. *F. P. C.*, 209 F. 2d 717, 721–723 (CA10), reversed on other points, 348 U.S. 492; *Alabama-Tennessee Natural Gas Co.* v. *F.P.C.*, 203 F. 2d 494, 497 (CA3).

B. The Commission is expressly authorized by the Natural Gas Act to issue a conditioned certificate. *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (CA3), certiorari denied, 353 U.S. 923. Here, unlike *McClatchy Broadcasting Co.* v. *F.C.C.*, 99 USAppDC 195, 239 F. 2d 19, certiorari denied, 353 U.S. 918,

no new issue is raised by the conditions, calling for a further hearing. *C.A.B.* v. *State Airlines*, 338 U.S. 572.

C. So also the Act expressly authorizes modification of a Commission order on application for rehearing "without further hearing" (Section 19 (a)) and hence the cases relied on by petitioner, involving I.C.C. orders vacating rate suspension orders, where there was no such express statutory authority, are clearly inapposite. The cases are of doubtful authority in any event, as shown by their subsequent history and by a conflicting decision, all overlooked by petitioner.

D. Petitioner's complaint that the time allowed for its brief was too short is wholly insubstantial absent any allegation that petitioner was prejudiced thereby. Petitioner's effort to prove that the Commission's consideration of the case was inadequate out of the Commission's own mouth fails to read the Commission's words correctly, and the complete competence of the Commission's opinion and orders disprove petitioner's efforts at disparagement.

Petitioner's complaints that its attempted "answer" to the application for rehearing filed by Houston Gas and its attempted application for a second rehearing were unlawfully rejected are without foundation in the Act and the decisions. Section 19 (b); *Philadelphia Electric Power Co.* v. *F.P.C.*, 156 F. 2d 648 (CA3).

A little less expedition would have ended the controversy between these parties in favor of petitioner, wholly regardless of the merits of the project. In such a situation the Court should review the proceedings as a whole and not isolated aspects thereof, or from a doctrinaire viewpoint, and full effect should be given the rule of prejudicial error. Section 10 (e) of the Administrative Procedure Act (*infra*, p. 34).

ARGUMENT

Introduction

Petitioner claims that the Commission's disapproval of certain aspects of the application as originally filed required that it deny the certificate. It says that the conditions upon which the certificate was instead issued constituted such an alteration

of the proposed project as to require a second hearing without which the conditioned certification was unlawful. It also contends that the Commission's original disapproval was correct and therefore that it was error for the Commission to modify any of the corrective conditions it had prescribed or permit them to be disregarded, as it says was done, and that in no event could that be done without another hearing, which was not held. Thus although alleging certain substantive errors—which we shall show its argument fails to establish—petitioner's brief is devoted principally to procedural questions. The alleged substantive errors are attributed to the questioned procedures, the Commission's resulting grasp of the case is impugned, its competence to deal with the certificate application in the manner followed is disparaged and apparently even its intellectual integrity questioned.[5]

No intelligent consideration of these objections is possible unless their substantive aspects are disentangled and considered separately from the procedural. Moreover, if the Commission was substantively right, as we shall show it was—if contrary to petitioner's allegations, the Commission's facts were accurate, its findings legally and factually supported, its legal premises and reasoning sound, and its result correct—the procedural ob-

[5] Four times petitioner applies the term "an equivocation" to the Commission's statement that this case received as full and careful consideration as that given to cases on a routine basis (i. e. where there is an examiner's report and exceptions to the report, Pet. Br. 7, 11, 16, 46), apparently from petitioner's failure to read the words of the Commission's statement with sufficient care or objectivity (see *infra*, p. 45). It repeats three times the patently erroneous charge that the Commission was "under the illusion" that the capacity of the project was 400,000 instead of 250,000 Mcf daily (Pet Br. 8, 12, 36; see *infra*, pp. 12–14). It characterizes the Commission's statutory findings as "formal recitation," "a mere formality," "boiler plate," and "pro forma" (Pet. Br. 7, 10, 19, 21); the decision of the case one month after the hearing closed as a "rush to a decision", "a race to a decision", "pell mell", "yielding to pressure", "rush through" (Pet. Br. 10, 11, 15, 22, 46); and its consideration of the case as "cursory and superficial", "obviously perfunctory", "formal rather than real", "merely token consideration," and "most cursory" (Pet. Br. 6, 23, 46). See *infra*, pp. 43–45.

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jections fall into a secondary posture.[6] For one thing, even assuming *arguendo* the existence of procedural errors, the question of whether they are prejudicial then arises (*infra*, p. 34). Again, substantive correctness of the several aspects of the Commission's decision strongly tends, in itself, to support the substantial correctness of the procedures by which the Commission reached such a decision. "By their fruits ye shall know them. Do men gather grapes from thorns or figs from thistles?" [7]

Accordingly, we shall take up the alleged substantive errors first, under point I, followed by the procedural questions under point II.

I. The findings made and conditions imposed were fully supported by the record and otherwise lawful

A. The Commission properly found the project economically feasible

Under the heading "Economic Feasibility," the Commission's opinion considers the revenues which may reasonably be expected to be produced by the operation of the proposed pipeline system, the expenses to be incurred, the resulting net return (and percentage rate of that return on the capital investment), the effect of prospective growth in markets and load factor, and the effect of the certificate conditions prescribed by the Commission, and concludes (R. 20423–20424):

> * * * [T]he requirement of economic feasibility has been met under applicants' proposals and we consider can be met under the conditions we shall hereinafter impose assuming that the certificates are accepted subject to those conditions.

The figures referred to by the Commission indicated that the return—

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[6] We do not here have a situation in which the correctness of the ultimate result cannot be judged because of the procedure followed, for the alleged procedural errors do not affect the scope of the record; hence the adequacy of the findings, the sufficiency of the record support, and whether the Commission's decision was otherwise substantively lawful are capable of objective determination.

[7] Matt. 7: 15–21.

> for the first three years appears to be less than fair, but as the return appears to increase each year and as the demands of the markets may reasonably be expected to grow, the load factor and the return should increase (R. 20422).

Petitioner's sole objection to this finding of economic feasibility is (Pet. Br. 36) that the Commission "was patently laboring under the illusion (see footnote 5, *supra*), [8] that Applicants' capacity would be 400,000 Mcf daily and that they would thus have unused capacity with which to supply increased demand. But," petitioner says, "applicants would have no unused capacity. Increased demand would have to be met by new construction. So that no real improvement in the 'less than fair' rate of return could be expected and the Applications therefore were not economically feasible."

But petitioner has not read either the Commission's language referred to, or the record, with sufficient care. The Commission's footnote 6 (R. 20425) to which petitioner refers, itself states:

> The facilities of Houston Gas were designed to transport a daily volume of 400,000 Mcf of gas *by the addition of more compressor facilities.* [Emphasis supplied.]

Thus the emphasized clause shows that the Commission was not "laboring under an illusion that the project capacity is 400,000 Mcf," but was stating a fact fully supported by the record (R. 4629, 4958), i. e., that the mere addition of compressor facilities would increase it to 400,000 Mcf. The Commission's obvious awareness of the 250,000 Mcf capacity at which the project would initially operate is shown by its use of that figure four times in the text of the opinion (R. 20411, 20413, 20424) including once in a paragraph immediately preceding that which it refers to. Moreover, the Commission's discussion shows its familiarity with the fact that as proposed to be constructed and operated initially there is no unused

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[8] Petitioner's footnote 5, thus referred to, reads as follows (Pet. Br. 36):
"Respondent's footnote 6, p. 15, Opinion No. 301 (R. 20425) states that the facilities of Houston Gas were designed to transport a daily volume of 400,000 Mcf. Respondent apparently was unaware of the amendment [to provide a 250,000 Mcf. daily capacity (R. 338–368)]."

capacity in the system when it talks about the 10% compressor "overload" necessary to achieve the initial capacity (R. 20422).

Petitioner is also careless in overlooking that what the Commission said was, not that the daily volume of gas, but the return, should increase (R. 20422, 20423). The record fully supports the Commission in this, even without any increase in the average daily gas volume, through increase in the developmental period's ratios of sales of higher-priced firm gas to lower-priced interruptible gas.[9]

Moreover, there should be improvement in the rate of return from transportation and sale of gas in "addition to" the initial 250,000 Mcf capacity, through additional compressors at relatively low incremental cost, for the reasons explicitly pointed out in the Commission's opinion, i. e., that (R. 20425, note 6)—

> The market and gas supply situation offers the reasonable prospect of substantially increased future deliveries with a corresponding improvement in load and lowering of unit costs.

The market situation referred to is discussed more fully by the Commission under the heading "Market" (R. 20418–20420) and the gas supply situation under the heading "Gas Supply" (R. 20412). No question is raised as to the adequacy of the record support for these conclusions.

B. No valid objection to applicants' proposed rates was left unsatisfied

As we read petitioner's brief, its complaint about applicants' rates is that while the Commission had first correctly decided the questions raised, it later erred by modifying the conditions it had originally imposed to implement those decisions, or by failing to insist that they be complied with. But examination of each of the five particulars complained of will make plain that where there has been a modification of the Commission's original requirement it has been in some relatively minor re-

[9] The trend of increase in the volume of sales of the higher-priced firm gas, and offsetting decrease in the volume of sales of the lower-priced interruptible gas, is plainly revealed in the record (R. 14449, 14475).

spect, legally and factually completely warranted, and derogating not at all from the principles of the first decision; but, more often, that petitioner is simply wrong in alleging that there has been a modification or failure to require compliance.

1. ***There has been no relaxation of the requirement that the rate level for each class of service bear its proper share of cost***

Citing the Commission's conclusion in Opinion 301 that Houston Gas' original rates were "not designed to require each class of service to bear its proper share of cost" to support the claim that a certificate should have been denied (Pet. Br. 36, para. 3), petitioner's brief goes on to argue that the rate levels finally accepted "give an unlawful preference to the power companies and maintain unreasonable differences as between classes of service" (Pet. Br. 37–38, para. 2). The argument is that as originally proposed the rates for transporting power company gas were found to be substantially lower than cost of service, while the rate for the sale of preferred interruptible gas was almost 7¢ per Mcf above cost, hence that the mere 2¢ per Mcf increase in the transportation rate made in response to the Commission's condition, left those rates "far out of line with the rate for the inferior preferred interruptible service which was left unchanged" (Pet. Br. 38).

Here again, petitioner has not read the Commission's first opinion, its later order, or the record, with sufficient care. While relying upon the Commission's original findings, petitioner disregards the qualifications with which the Commission carefully hedged round and interlarded its use of the figures seized on by petitioner. Thus the Commission introduced its use of those figures in its first opinion with respect to the originally proposed rates by saying (R. 20426):

> * * * the record *indicates* that those transportation rates fall far short of being commensurate with the cost of firm service, and in fact bear much less of the transportation cost burden than Houston Gas' rates to its other customers. [Emphasis supplied.]

Note that the Commission speaks of the record generally as "*indicating,*" not "establishing," or "showing," or "proving"

that the rates are not commensurate with cost. Note also that the generality of the Commission's conclusion does not depend on any preciseness in the figures from which petitioner derives its exact 7¢ excess of the preferred interruptible gas rate over the cost of that service.

Moreover, those particular figures are not referred to by the Commission even as "indicated". They are figures from a Houston Gas exhibit cited *as such* by the Commission to decide this point adversely to that company's contentions (R. 20427).

Finally, the Commission concluded its discussion of this subject with this further and express *caveat* about the figures upon which petitioner's present contentions depend (R. 20427):

> Thus although the evidence is *not sufficient* to enable a determination of precisely what the proper rate should be, it sufficiently supports the conclusion that Houston Gas' presently proposed rates are not designed to require each class of service to bear its proper share of costs * * *. [Emphasis supplied.]

Yet, contrary to these plain warnings, these figures are relied upon by petitioner, and relied on alone, as sufficient "to enable a determination of precisely what the proper rate should be" and hence as establishing that the new rates are "out of line" in providing a 2¢ change to correct its alleged 7¢ difference.

Obviously, such a careless misuse of the Commission's first opinion affords no basis for petitioner's contention that there has been a modification of, or failure to enforce that decision. The order accompanying that opinion required (R. 20439):

> (1) The rates set forth in the tariffs for firm sales for resale, interruptible sales, and for transportation, shall be commensurate with the cost of service determined on a reasonable allocation of costs between these services in accordance with usual Commission standards and based on a rate of return of not in excess of 6%.

The February 21 order accepted Houston Gas' tariffs as being in conformity with this condition (R. 20909) only after determining that they fully complied (R. 20901):

> In support of its proposed rates Houston Gas has submitted cost-of-service data reflecting a 6% rate of re-

> turn on its own facilities, as well as Coastal's. Houston Gas' costs, together with those of Coastal, have been allocated on the basis of estimated single peak-day demands, annual volumes and number of delivery points, and a cost computed for each category of service to be performed by Houston Gas. On the basis of this data, and applying the usual Commission standards, it would appear that while the proposed rates for each type of service will yield something less than a six per cent rate of return, they will produce such revenues as to render the project economically feasible. It may be, of course, that actual experience will present a different picture with respect to these rates. Further, if the capacity of the proposed system is substantially increased the transportation costs may be altered. However, for the purposes of these proceedings, we will accept these rate levels without prejudice to any findings we might make in a future proceeding.

Petitioner's brief seems to assume that the Commission is required to conduct a full scale "rate case" as an incident to the granting of a certificate. No such requirement exists; the Commission is not required to formulate rate-case conclusions as an incident to the determination of public convenience and necessity (see, e. g., *Anthony J. Tamborello, et al.*, 15 F.P.C. 1, 2, Opinion 287–A, issued Jan. 20, 1956, Docket Nos. G–3045, et al.; *Sinclair Oil and Gas Co.*, 15 F. P. C. 665, 669, initial decision issued Feb. 10, 1956, effective Mar. 12, 1956, as final decision of Commission, Docket Nos. G–9049, et al.), and no such suggestion appears in the statute or in any of the court or Power Commission cases on the subject.

2. Houston Gas' revised transportation rate is not based on prices of competing fuel oil

As a corollary of the contention just considered, petitioner says that, notwithstanding the Commission's disapproval of the original "transportation rate which [being] determined basically on a comparison with * * * oil, * * * is designed * * * to insure that the charges to the power companies for natural gas service will remain competitive with those for oil" (R.

20425), the same arrangement "was permitted to be maintained" (Pet. Br. 37). But here again petitioner's reading of the Commission's opinion and orders is not sufficiently careful to disclose the true impact of the Commission's original objection or to recognize the complete adequacy of Houston Gas' revision of its transportation rate to satisfy that objection.

Gas service to the two power companies will be comprised of two elements. The first is the supplying of the gas by producers who will sell directly to the power companies. Those sales, not being "for resale for ultimate public consumption," [10] were not asserted by the Commission to be subject to its regulatory jurisdiction (see *infra,* pp. 26–30). The second is the transportation of the gas by applicants' pipeline system to the points of deliveries to the power companies. The Commission undertook to exercise full certificating jurisdiction over that service.

What the Commission objected to in Opinion 301 was that the original *transportation rates,* which are the rates subject to its jurisdiction, had been fixed below the cost of that service and at the end of the second year would be reduced yet more, to insure that the total of the charges to the power companies for natural gas service (comprised of charges for both supply and transportation) would remain competitive with oil (R. 20425–6).

Applicants satisfied the Commission's objection, insofar as rate level is concerned, when they filed revised contracts fixing the rates for transportation of gas for Florida Power at a simple 13.5¢ per Mcf and for Florida Power & Light at 17.5¢, based on cost of service (R. 20900), and eliminated the originally proposed reductions at the end of the second year.

Although the revised arrangements include provisions relating the total charges paid by the power companies to the price of competing fuel oil, this is done, as the opinion of Commissioner Connole concurring in the February 21 order states (R. 20911), solely by adjustments in the non-jurisdictional charges

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[10] Section 1 (b), Natural Gas Act.

for the supply of gas by the producers,[11] not in the jurisdictional charges for transportation. The transportation rates will of course continuously be subject to the Commission's scrutiny and revision, upon its own motion or upon complaint, to assure that they remain consonant with the cost of the transportation service.

Thus there is wholly lacking any basis whatever for petitioner's complaint that the *transportation rates* continue "to result in an unequal distribution of the cost of service so that each class of service would not bear its proper share," constitute an undue preference and unreasonable difference between classes of service, and contain an escalation clause.

3. Additional conditions imposed by the second Commission order made reasonable provision for eliminating a possible preference in Coastal's allocation of demand costs

An obscure clause in petitioner's attempted substantiation of the complaint just discussed reads as follows (Pet. Br. 32):

> * * * Respondent * * * permitted Houston (sic) to allocate costs during the first year so as to give preference to transportation service if such service is not required to be curtailed during peak days (R. 20899).

The statement is not elucidated and as written in reference to Houston Gas is meaningless to us. However, it may be observed that the cited portion of the Commission's opinion, dealing with *Coastal's* cost-of-service formula rate, properly required elimination of a potentially preferential provision. Coastal's charges to Houston Gas for Coastal's portion of the transportation of the power companies' gas (which becomes part of the total cost of service on which Houston Gas bases its rate to the power companies for the entire transportation of their gas) are made under a cost-of-service formula rate. As set forth in Coastal's revised rate filing that formula allocated the demand component of Coastal's costs to transportation service upon the basis of the contract demand, i. e., the

[11] Thus the producers not only reduce their initial rates and their rates at the end of the second year, but undertake to absorb half of any future increase made by the F.P.C. in the transportation rate, by reducing their charges (R. 20911).

peak day volume as reduced if Houston Gas exercises its right to cut back the capacity devoted to transportation of power company gas on peak days. The Commission, pointing out that this could result in a preference to the transportation service when the cut-back right is not exercised, required that Coastal file "revised sheets showing that demand costs will be allocated between the two services for the second year of operations and thereafter on the basis of average deliveries under the two services during the three-day sustained peak period of the preceding 12 months" (R. 20899).

This basing of the computation of demand on actual experience was reasonable in view of the absence of natural gas utility load experience in the atypical Florida climate. This method, of course, cannot be used for the first year of operation as no past year's record of experience is available, and thus practical necessity warranted the Commission in permitting the use for the first year of the contract demand as the fairest expedient until data based upon the first year's actual operation become available.

Thus, while petitioner's precise criticism of the Commission's actions is obscure, it is plain that the Commission effectively and in an entirely reasonable manner eliminated this potential preferential or discriminatory aspect of Coastal's rates. Moreover, in this instance, inasmuch as Houston's Gas' rates to the power companies for the total transportation service are fixed at specified numbers of cents per Mcf and Coastal's formula rate to Houston Gas upon a rate of return limited to 6% for both companies, the questioned allocation constitutes little more than an intercompany bookkeeping adjustment with no direct, and little, if any, indirect impact upon consumers' interests.

4. The Commission properly found that the revised minimum bill clauses submitted by Houston Gas did not require change

Another particular in which petitioner complains that the Commission erred by modifying or failing to enforce a condition previously imposed with respect to applicants' rates is that "Respondent withdrew its requirements that the minimum bill provisions in Houston's contracts be changed (R. 20901)." Pet. Br. 32.

Here, yet again, the petitioner is careless in its reading of the Commission's opinion and two orders. A more accurate statement would be that upon the application for rehearing the Commission reconsidered and modified its previously imposed condition and accepted Houston Gas' filed revisions of its minimum bill clauses as satisfactory compliance with the condition as so modified. A brief analysis will suffice to show that the modified condition was legally and factually warranted.

The Commission's original condition required revision of Houston Gas' schedule G for general firm service (i. e., sales for local utility distribution) "to provide a minimum bill that is based at least in part upon demand, and on a monthly rather than an annual basis" (R. 20439, para. (B) (3)). The condition rested on the following finding (R. 20432):

> Houston Gas' Rate Schedule G computes a minimum annual bill by multiplying 65% of the annual contract quantity times the 55¢ rate. This method is not in accordance with regulatory practice. A minimum bill should be based at least in part upon demand, because the facilities built must be of sufficient capacity to meet peak day deliveries and should be on a monthly rather than an annual basis to avoid uncertainty as to actual charges until the end of the year.

In response, Houston Gas filed revised rate schedules containing a changed provision for a "minimum monthly bill under the rate schedule * * * equal to 50% of the buyer's elected portion of the annual contract quantity applicable in the month multiplied by * * * [the rate] per Mcf" (R. 20900), and requested rehearing to set aside the originally prescribed condition (R. 28897).

The Commission, upon consideration of the new minimum bill clause, found that elimination of that condition "was consistent with the public convenience and necessity" saying (R. 20901):

> Houston Gas points out that the market conditions in Florida are atypical in that the load factor is very low in individual resale markets because of the mild climate; and that a relaxation of our usual standards in

> this respect would avoid penalizing consumers. The proposed annual minimum may be accepted since under the provisions the customer pays for 50% of the annual contract purchases from Houston Gas instead of 65% originally proposed, and the customers will allocate the annual payment among the 12 months so as to correspond with maximum and minimum monthly purchases and thus mitigate any penalty effect under the original annual minimum bill.

There is no question as to the record support for this finding or that the ultimate result reached by the Commission would have been valid if it had been reached in the Commission's Opinion 301 and accompanying order.

But any implication that findings are suspect because they represent a change from findings first made in a proceeding is unwarranted. As the Judge Hutcheson said for the court in *Cia Mexicana De Gas, S.A.* v. *F.P.C.*, 167 F. 2d 804, 806 (CA5):

> A Commission, like a court, may, indeed should, change its findings and order if on rehearing it is of a different mind. If it does so change, our function on a review of its findings and order is to determine not which of the two findings and orders was the best but whether, as claimed by petitioner, the findings and order under review are without evidence to support it.

Thus the sole objections with respect to this modification are procedural and will be considered under point II.

5. The Commission properly allowed cancellation options to be retained as to 3% of Houston Gas' sales

The last of the five particulars in which petitioner objects to applicant's revised and conditioned rates is that the Commission permitted customer cancellation options in one class of Houston's contract, i. e., for sales of direct primary interruptible gas (Pet. Br. 23), after originally requiring their elimination from those contracts as well as from contracts for transportation of gas for the power companies.

In Opinion 301 the Commission treated the question of these cancellation clauses as a corollary of its conclusions as to such

clauses with respect to the transportation of power company gas, the latter constituting almost 60% of the business (R. 20420). As to that 60%, the Commission had found that the cancellation clauses in the transportation contracts were "seriously objectionable, for they would create basic uncertainty as to essentials which must be reasonably ascertainable in order for it to be found that a project is feasible" (R. 20428). Later, in that opinion taking up the question of such clauses in contracts for direct primary sales (constituting only 3.4% of the business), the Commission said that they "would aggravate the threat to the econmic feasibility of the project inherent in the cancellation provisions of the transportation agreements," and required that they too be eliminated (R. 20431, 20439).

But after elimination of the cancellation provisions from the transportation agreements had been substantially accomplished, through the revisions made and the further conditions imposed, the presence of such provisions in the direct primary interruptible sales, comprising only 3.4% of the business, no longer appeared as "aggravating" any threat to economic feasibility—the principal threat had for all practical purposes been removed, and the clauses in the direct primary interruptible sales alone constituted no substantial threat. Accordingly, upon Houston Gas' application for rehearing, the Commission properly found that they would have only a *de minimus* effect. Moreover, renegotiation of the contracts with the buyers, many of whom were municipalities, would cause untoward delay. For these reasons and in view of the demand for gas service shown by the record, which would make replacement easy for any of this business which might be cancelled, and hence obviate any hazard to the economic feasibility of the project, the Commission relieved Houston Gas of this condition (R. 24901). There can be no serious disagreement as to the *de minimus* nature of cancellation provisions in the direct primary interruptible sales or the reasonableness of the lifting of that condition, if indeed it was properly imposed in the first instance.[12]

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[12] There is no question as to the adequacy of the record to support the Commission's findings on applications for rehearing, and the findings are not rendered suspect by the fact of change on application for rehearing. See *supra*, p. 22.

C. The Commission properly refrained from further inquiry concerning suppliers' sales

Petitioner contends that the Commission erred in not determining questions of the lawfulness of the producers' rates for gas supplied to Coastal, and of Commission jurisdicition over the producers' sales of gas to the power companies. But the Commission refrained from both inquiries on the ground that they would be more appropriately decided in separate proceedings for those purposes and in this it was clearly correct.

1. *The lawfulness of the rates charged to Coastal by its suppliers is more properly regulated separately under the rate sections of the Act*

In the absence of any claim that the rates paid by Coastal for its gas supply are either unreasonably high or in any other respect unlawful, no prolonged discussion seems warranted of petitioner's argument (Pet. Br. 38–40) that the Commission should not have issued a certificate until it had held a full fledged rate case on those rates. But confronted with the Commission's plainly valid explanation (R. 20436) that those rates are subject to its "continuing supervision and control and if sufficient reason appears therefor can be considered on the basis of a factual record developed in an appropriate proceeding under the Act," petitioner makes shift to argue that "the producers' rates might be too high or too low without being unlawful" and, "by withholding certificates, any increase or decrease in rates could be effected on the basis that the one or the other would best satisfy the overall needs." Pet. Br. 38–39.

This verges on reckless irresponsibility. Unable (or unwilling) to contend that the producers' rates are either too high or too low, petitioner would have a certificate withheld by the Commission in an attempt to force either an increase or a decrease, *in rates which are by hypothesis, lawful.* The proposed basis for determining whether to increase or decrease is "overall needs" (Pet. Br. 39). But petitioner's undefined "overall needs" can lawfully be nothing other than what the Commission has already found to be satisfied, i. e., the requirement of economic feasibility of the project. That requirement being met, what possible justification can there be for the legal hold-up advocated by petitioner? And this in the face of the

evidence which impelled the Commission to conclude in effect that delay in action on the applications would jeopardize the public interest. See *infra*, pp. 34–38.

Petitioner's approving reference to the 2¢ per Mcf reduction which the power companies were able to obtain from the producers when the Commission refused to accept the original transportation rate (strange as such approval sounds in the mouth of the fuel oil interests who are objecting to the competition of natural gas as being priced too low) merely invites this Court to reweigh that evidence against other evidence indicating a lower cost of gas would not have been obtainable,[13] contrary to the statutory terms under which this review is had. Section 19 (b) of the Natural Gas Act.

Moreover, the Commission's rejection of the original transportation rates rested on the sound ground that the transportation rates were unlawful, while petitioner here proposes to hi-jack applicants into lower or higher rates than proposed (it doesn't know which) where the proposed rates are not alleged to be unlawful, but merely to fall somewhere else in a "zone of reasonableness."

Petitioner goes on to suggest that if the supplier's rates are too low they may have to be raised after the certificate is issued. If this is done, it says, that would destroy the economic feasibility of the project because there is no margin of unused capacity enabling applicants to increase their revenues. This overlooks the fact that the producers have entered into long term contracts to supply gas at the rates in question and if they are too low they may not be raised without applicants' consent except on a Commission finding that they are so low as to adversely affect the public interest (*F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355). The necessity for that finding would surely protect against the eventuality envisioned by petitioner. As to the error of petitioner's contention that there is no margin for increase in project revenues, see *supra*, pp. 13–14.

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[13] Such as the withdrawal of other certificate applications while this application was pending due to applicant's inability to get extensions of gas supply options, and the present petitioner's ultimate inability to obtain 100,000 Mcf of the gas which it expected when it originally proposed a 400,000 daily average capacity project. See *infra*, pp. 34–38.

Petitioner's alternative suggestion, that if the rates are too high certification will mean that the overcharges during the period which must elapse until a rate reduction order can be made effective by the Commission can never be recouped, presents a dilemma which can be stated simply: Is it better for the State of Florida to have gas service and wait for a rate reduction which is a mere theoretical possibility not supported by any evidence, or to go on waiting for gas service? The Commission has resolved that dilemma and in a manner which, we submit, was within its competence and the area of its discretion in administering the related certificate and rate provisions of the Act.

Petitioner's final argument, citing *City of Pittsburgh* v. *F.P.C.*, 99 USAppDC 113, 237 F. 2d 741, 752, as holding that the Commission could not defer consideration of the possibility of an increase in costs in an analogous situation, is not based on a sufficiently careful reading of that decision. The alleged cost increase which the Commission was there required to consider was not an increase in the costs of the project for which a certificate was being sought, but an increase which certification of that project would bring about in the cost of a contemplated future expansion of facilities, and not correctible in future rate proceedings. In the present case, the possible increase (or decrease) would not result from the certification and could be corrected in future rate proceedings, and is therefore not one of the effects of certification which must be considered under the rule of the *Pittsburgh* case.

2. Decision as to Commission jurisdiction over producers' sales to Florida Power was not necessary to certification of this project

Petitioner, interpreting the transportation gas contracts as giving Houston Gas an option to take gas sold by producers to Florida Power and pay Florida Power for the gas so taken, points out that such a taking for payment would constitute a purchase from, and sale by, Florida Power, causing that company, and its suppliers, to be sellers of natural gas in sales for resale which would be subject to the jurisdiction of the Commission. Without citing any evidence tending to show any reasonable prospect that Houston Gas would exercise the

alleged option, and, in fact, without even claiming that there *is* any prospect of such an unlikely action, petititioner argues only that *if* Houston Gas did exercise that option it would thereby trigger cancellation of the contracts. It then says that the loss of the business of transporting the Florida Power gas, resulting from such cancellation, would destroy the economic feasibility of the project. Hence, it argues, it was incumbent upon the Commission to decide the jurisdictional question before it could determine the economic feasibility of the project. Pet. Br. 40–42.

The absence of any allegation of any reasonable possibility that Houston Gas would exercise such an option, if it had one, destroying the economic feasibility of its project, is sufficient in itself to dispose of this argument. But we need not stand on this absence of allegation alone. For a reading of the contracts makes plain that they do not give Houston the claimed option and in any event, if the sales are subject to Commission jurisdiction, the abandonment provisions of Section 7 (b) fully protect the public interest.

The contracts give Houston Gas no option to take transportation gas.—Under the transportation contract as modified (R. 20534, *et seq.*), the producers deliver the gas into the pipeline system at the same times and in the same amounts as Florida Power takes it from the system (R. 20540). When Houston Gas requires additional pipeline capacity to supply its firm gas customers on peak days it is entitled to curtail or cut back the pipeline system transportation capacity available for transportation of Florida Power gas by the requisite amount (R. 20542, 14518). Florida Power's take is reduced to the extent of the cut back and, simultaneously, deliveries by its suppliers into the system are reduced to the same extent (R. 20542, 14519). At the same time Coastal draws more heavily on its own gas reserves to deliver corresponding additional amounts into the system (R. 5663–5668, 5380–5381, 5389–5392)—and thus Houston Gas in enabled to make its peak deliveries to its firm gas customers from Coastal's supplies.

This arrangement is obviously designed to avoid any sale by Houston Gas of gas supplied by Florida Power's suppliers. It is based on the industry practice of treating the gas in the

pipeline as a pool of a fungible commodity whose commercial significance is its energy (BTU) content, and on the attribution of deliveries into the pool to simultaneous deliveries from the pool in corresponding amounts, regardless of any conceptualistic identification of molecules of gas.[14] The disregard of commercially insignficant departures from exact identity or equivalence in determining whether to assert jurisdiction is clearly within the Commission's discretion. *Cf. Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 536. Hence the mere curtailing of transportation service in accordance with these arrangements compels no assertion of Commission jurisdiction.

The same is true with respect to "make-up gas." The arrangements for make-up gas grow out of the minimum take-or-pay provisions of Florida Power's contracts for purchase of its gas (R. 20557–8, 9869, 9895). Because of those provisions, if transportation is curtailed by Houston Gas to such an extent and for such a period that Florida Power's takes are reduced below the fixed minimum, it would have nevertheless had to pay for the minimum, regardless of the deficiency. To prevent this, provisions have been included in the contracts for its suppliers to furnish equivalent amounts of gas (R. 14530, 14531) and for Houston Gas to transport it (R. 20543), without further charge, and Florida Power to receive delivery thereof, over the rest of the year.

Thus far no different jurisdictional problem is presented than by the curtailment itself. However, it may not always be feasible, because of factors limiting capacities to supply or transport or consume from time to time, for the parties to schedule deliveries of the full amount of gas so as fully to make up for the deficiencies paid for but not received by Florida Power. Therefore, to nevertheless save Florida Power harmless from the curtailment, Houston Gas contracts to reimburse Florida Power for any failure of delivery of make-up gas (R. 20543–4). Houston Gas has received the benefit of the cutback and if as a result of the cutback Florida Power incurs a loss it is only fair that the contracts provide that its loss be reimbursed by Houston Gas. In effect that payment becomes

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[14] Cf. *City of Hastings, Nebraska* v. *F.P.C.*, 95 USAppDC 158, 221 F. 2d. 31.

part of the *quid pro quo* for Houston Gas' exercise of its right of curtailment of transportation service to Florida Power on peak days.

But it is this provision, that Houston Gas pay if the full amount of make-up gas is not delivered, that petitioner seizes upon and, erroneously labeling it a payment for the undelivered make-up gas, seeks to interpret it as impliedly giving Houston Gas a right to fail to deliver; in other words, an option itself to take make-up gas.

But this effort to read into the contract by implication a right in Houston Gas to take such gas is clearly erroneous. In the first place it is negatived by the express provision of the contract that Florida Power (R. 20543) —

> shall be *entitled to receive* and agrees to take, to the extent permitted by its operations, delivery from Houston, of all gas (attributable to such reduction) so paid for but not received ("make-up gas") during the following eleven months, by taking gas from Sun and Pure in excess of Florida's scheduled daily delivery hereunder, *and Houston agrees,* subject only to Houston having pipeline delivery capacity therefor and to Houston's ability to meet said demands of Houston's firm resale customers as set forth above, *to deliver said make-up gas to Florida.* [Emphasis supplied.]

This is confirmed by the unequivocal testimony of a witness for Houston Gas that under no circumstances would his company sell transportation gas taken from the fields of Florida Power's suppliers to customers of Houston Gas (R. 5028). And another witness for Houston Gas was equally explicit and emphatic that under the curtailment and make-up provisions of the contracts none of the so-called transportation gas will be used for resale purposes (R. 6058).

The Act Provides Protection Against Loss of Business If Make-Up Gas Sales Were Held Jursdictional.—Assuming *arguendo* that Houston Gas has the claimed option to take make-up gas, and may exercise it, and that its exercise will involve F.P.C. jurisdiction over the power companies' suppliers' sales, any resulting desire by the suppliers to abandon their

sales so as to avoid F.P.C. jurisdiction would fall within the scope of the Third Circuit's decision in *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550 (CA 3), certiorari denied, 352 U.S. 971. It was there held that a producer making a sale of gas, without certificate authorization, which was found to be subject to F.P.C. jurisdiction could not escape that jurisdiction by terminating the sale in accordance with its contractual rights to do so without obtaining a certificate of abandonment under Section 7 (b) of the Act. By the terms of that Section, no abandonment can be authorized unless the public convenience and necessity permit, which should provide adequate protection against any abandonment of business that would imperil the economic feasibility of the project sufficiently to constitute a threat to the public interest.

D. The Commission gave proper consideration to the policies of the antitrust and fair trade laws

Petitioner, complaining of the competition natural gas will introduce in the heretofore protected markets its members have enjoyed in the sale of fuel oil in Florida, charges that the Commission failed to pass upon the antitrust issue (Pet. Br. 45). Actually what petitioner objects to is the failure of its efforts to divert the Commission from the main issue of public convenience and necessity, in the consideration of which the Commission was plainly and avowedly aware of the aspects of national policy embodied in the antitrust and fair trade laws. Far from failing to pass on the issue, the Commission made consideration of that issue central to its decision, as shown by its Opinion (R. 20418, 20425, 20437):

> The public need for gas in Florida and the corresponding benefits of gas service to consumers in that state derive from a number of circumstances. We have already mentioned some of the market factors which favor the introduction of natural gas to Florida. It is obviously at a disadvantage both competitively and otherwise, by its dependence upon petroleum products,

a single source of fuel.[3] The introduction of natural gas, in addition to making available to consumers in Florida the usual benefits of natural gas of cleanliness, convenience and economy, would provide a second source of fuel to help forestall any possible emergency shortage, would give rise to greater fuel competition in the state with its attendant public advantages, would aid in the economic development of the state by stimulating industry and otherwise, and would help meet the growing fuel demands of the burgeoning Florida population.

* * * * *

At the outset, we may observe that the fact that this arrangement involves the transportation of very substantial volumes of gas for use as boiler fuel does not require its rejection. In this regard, this case is *sui generis*. We have already detailed the characteristics of the Florida market which require us, in the public interest and within the limitations of our permissible discretion, to admit of a departure in this case from the standards we have heretofore applied in determining whether to approve of boiler sales. Moreover, the record supports the conclusion that as applicants' service develops, * * * the proportionate part of its sales devoted to uses which more fully employ the distinctive potentials of natural gas will increase.

* * * * *

Nor do the interests of competitors compel us to deny the certificates here. The distinctive market conditions which justify permitting the use of the large volumes of gas involved here for boiler fuel have been detailed above. In this regard, this case stands alone. And although it may be that sellers of liquefied petroleum gas in the State of Florida, such as the Natural Gas Com-

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[3] For example, during World War II, the heating and industrial fuel supply, as well as the electrical and petroleum gas supply of the state, were critically threatened by the tanker sinkings and the enlarged military oil needs of that time.

> pany of Florida, and the railroads, such as the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company, may initially suffer economic losses, it reasonably appears that increased industrial and other activity in Florida resulting from the introduction of natural gas will yield offsetting benefits in the long run. We therefore conclude that the need and desire of the public in Florida for natural gas turns the scales against these competing interests.

Petitioner's objection to the overall pricing of gas supply and transportation so as to give the power company customers a considerable degree of assurance of prices for gas that will warrant conversion to gas, overlook a number of important considerations that make this method of pricing entirely reasonable.

The first is that installation of facilities for the utilization of particular fuels whether coal, oil, or gas, under large boilers requires large capital outlays as does the construction of pipeline or other transportation facilities to bring fuels the long distance required to reach Florida delivery points. Such capital outlays make long term large volume commitments upon the part of both buyer and seller necessary, if the capital requirements are to be financed. In view of the Commission's findings on economic feasibility there is no warrant for any charge that the parties subject to the jurisdiction of the F.P.C., or the power companies' suppliers, have adopted any unreasonable pricing methods. In these circumstances, to speak of the method of pricing agreed upon as one adopted for "the elimination of fuel oil competition" is to indulge in absurdity (Pet. Br. 44).

The second is that the negotiation of the delivered price of this gas in Florida to make it low enough to be competitive with oil was with gas suppliers selling their gas in a national market where the demands of consumers from as far away as New York compete with those of Florida, as the active participation and contentions of New York market interests in the proceeding before the Commission dramatically demonstrated. The result of those negotiations is the result of the operation of a free market, not an effort to restrict freedom of the market, so far as here appears.

A third consideration is that the power company customers are themselves regulated utilities for which fuel costs are a major item of operating expense and a matter upon which at least one of the companies has been under the pressure of repeated complaints by the Georgia Public Service Commission and investigation by the Power Commission itself.[15]

Nor does petitioner's carelessness in its use of facts help its contentions on the antitrust question. Assuming *arguendo* the correctness of its statement that its members will suffer half of the approximately $40,000,000 total loss of gross revenues from sales of fuel oils displaced by gas, it is a completely incorrect representation that petitioner's "dealer members are thus threatened with loss of half of *their* oil revenues, tantamount to economic destruction * * *." [Emphasis supplied.]

Nor will an acute reader uncritically accept the statement that a $40,000,000 loss in sales "would necessarily *increase* the price of oil" (Pet. Br. 43). And even if inversion of the operation of elementary principles of supply and demand is accepted, there still remains the hurdle of petitioner's next statement that "as against the overall fuel needs of the State of Florida, the volume of gas brought in would be meager" (Ibid.).

In summary, a careful point by point examination of the substantive aspects of petitioner's complaint has disclosed an unusual paucity of content in its objections. The Commission's position in every challenged particular has started from an accurate knowledge of the facts—usually more accurate than petitioner's own, as we have seen. The Commission's reasoning, though succint, has been shown invariably sound; its legal premises, where questioned, correct; its findings, satisfying the Act and substantiated by the record.

We turn now to consider whether these fruits were gathered from procedural thorns and thistles.

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[15] See *Georgia P. S. C.* v. *Florida Power Corp.*, 15 F. P. C. 5, 11–12, Opinion 290. Docket E–6628, Feb. 27, 1956; *Florida Power Corp., et al.*, 9 F. P. C. 547, order issued Feb. 24, 1950, Docket No. E–6152.

II. The Commission's procedures were not defective

Introduction

Underlying all of petitioner's procedural objections is its assumption that there really was no need for Commission decision by December 31, 1956, when the gas supply options expired. And, not having that sense of urgency, it regards the Commission's procedures which were necessary if decision were to be reached by that date as unreasonable (see footnote 5, *supra*, p. 11). It is, of course, understandable that the private interests of petitioner's members should incline it to delay, and its inclination should color its judgment, just as applicants' private interests incline them to haste. The Commission is obliged not only to consider the interests of both but the public interest. That it has done so in the pace it adopted in the procedures here involved will be plain from an examination of its omission of the intermediate decision procedure which we take up first. When the basis for that action is understood it will illuminate the subsequent consideration of the other procedures complained of by petitioner.

One other consideration should be mentioned by way of introduction. It is easier to make captious criticisms of procedures, than to devise and follow procedures that will satisfy all parties, particularly where the difference between expedition or lack of it can mean the difference between a favorable and an adverse outcome of the controversy, regardless of its merits. In such a situation, the rule of prejudicial error should be given maximum effect and the procedures complained of should not be viewed in isolation or from a doctrinaire viewpoint but, as enjoined by 10 (e) the Administrative Procedure Act,[16]

> * * * the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

A. The omission of the intermediate decision procedure was lawful

There is no contention here that this was not a proceeding for "rule making or determining application for initial license"

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[16] Act of June 11, 1946, c. 324, 60 Stat. 242, 5 USC 1009 (e).

in which Section 8 (a) of the Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 242, 5 USC 1007 (a)) provides for the omission of the intermediate decision procedure "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." [17] There also is no contention here (Pet. Br. 21) that the Commission did not make such a finding (R. 20338).

The narrow question presented is whether the record supports the finding. Petitioner says it does not (Pet. Br. 21–23), alleging that the finding was based solely on the fact that Coastal's gas supply contracts would become cancellable by the suppliers if it had not received a Commission certificate by December 31, 1956 (R. 20337). This, it says, was insufficient for want of affirmative evidence of suppliers' intention to cancel rather than extend the options, as others had been extended; also because applicants should have fixed later deadline dates because they should have known the proceedings on the applications would be unlikely to be decided by December 31, 1956 (Pet. Br. 21).

The difficulty with petitioner's position as to terms or extension of the options is that neither applicants nor the Commission can know how long a certificate case will take or what the supplier's intentions with respect to cancellation are, and hence it would be a mistake to attribute too much significance to the facts on which petitioner stands alone. As it happened, on the very day petitioner was first opposing the omission of the intermediate decision procedure in this case, November 14, 1956 (R. 6605–6608; 6665–6670) another applicant for a pipeline certificate in a proceeding simultaneously in hearing before the Commission held across the hall, failed to obtain extensions of

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[17] Section 8 (a) provides in relevant part as follows:

"In cases in which the agency has not presided at the reception of the evidence, the officer who presided * * * shall initially decide the case or the agency shall require * * * the entire record to be certified to it for initial decision. * * * Wherever the agency makes the decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses * * * any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

its six months gas supply options.[18] Two days later that hearing recessed and subsequently four of five consolidated applications were withdrawn. *American Louisiana Pipe Line Co.*, Docket No. G–10396.

In this case the nature of the gas supply made renewability of the options a matter of uncertainty. For it is comprised of a large number of relatively small amounts of gas, making alternative sales of the gas to other customers a very ready possibility. This gas will not come from an isolated field dependent on the new line for its marketability. The 47 contracts (Pet. Br. 21) are with 33 producers in 37 fields (R. 2807, 2830–2958) located in "Pipe Line Alley"—an area along the Gulf Coast which is traversed by numerous pipeline systems, all probably potential buyers: Transcontinental Gas Pipe Line Co., Wilcox Trend Gathering System, Inc., Tennessee Gas Transmission Co., Texas Eastern Transmission Corp., Texas Illinois Gas Pipe Line Co., as well as local or intrastate systems.

Moreover, the evidence in the record plainly discloses that the original obtaining of a sufficient gas supply had proved to be a touch-and-go proposition and, if so, that obtaining extensions might also. The dates of the 47 contracts range from November 1, 1955 (R. 8690–8741, 8746–8796, 8801–8856, 8861–8911), to October 15, 1956 (R. 14294–14345), or almost a year. And negotiations had doubtless extended over a considerably longer period. The first contracts had contemplated the filing of Coastal's application by March 1, 1956, and the issuance of a certificate by July 2, 1956 (R. 8128). But assemblying the gas supply took a longer time than had been anticipated, and the first options started running out before the last ones were signed. Coastal was able to obtain enough extensions until December 31, 1956, but this was only at additional cost through incurring obligations to reimburse the suppliers for delay rentals and shut-in payments (see e. g., R. 8798, 8914), and in every case the delay in taking the gas advanced Coastal's total

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[18] The clauses in those contracts provided: "If either party shall fail to obtain requisite authority from the Commission within six months after making application therefor, the othe party may cancel this contact." The application was filed May 14, 1956, and the contract cancelled November 14, 1956.

cost of gas under the contract because it moved up the ladder of the periodic price escalation provisions. Testimony that new contracts would be more costly was uncontroverted (R. 6582).

Moreover, although Coastal's original application showed that it expected to obtain a total supply of 200,000 Mcf daily average, it ultimately had to amend its application and reduce the projected daily average by 100,000 Mcf because it did not succeed in obtaining a supply of 100,000 Mcf per day for which it was negotiating in the Rayne Field, Acadia Parish, Louisiana (R. 335).

Finally the objection that applicants did not allow sufficient time for disposal of the application in fixing the December 31, 1956, deadline overlooks the statement upon behalf of applicants that the date fixed was dictated by the suppliers, not Coastal (R. 6607). There is no evidence or basis for inference that the options could have been obtained for longer terms.

Thus the evidence fully warranted the Commission in concluding that if on final consideration it should find that the public convenience and necessity required the project, action on the applications by December 1, 1956, was of primary importance. That the evidence warranted the finding ultimately made that the public convenience and necessity did require the project is apparent from the lack of merit we have already shown (*supra*, pp. 12–33) in petitioner's substantive objections to the Commission's findings. Hence, the propriety of the Commission's findings for omission of the intermediate decision procedure boils down to the question of whether a decision could have been reached by December 31, 1956, without the omission, and whether it was feasible to reach a decision in the 33 days available after the close of the hearing.

The answer to the first question was obvious. Under the schedule fixed by the examiner, the last briefs would be filed December 27. There then would be required under normal procedure a period for the examiner to prepare and issue his report, followed by 20 days for exceptions thereto as provided in the Commission's rules (18 C. F. R. 1.31 (a)) and a period for the Commission to reach a decision on the exceptions and formulate its order and opinion, if any. Decision by Decem-

ber 31, 1956, under the normal procedure was plainly impossible no matter how rigorously the schedule might be compressed.

There was a reasonable possibility that a decision could be reached by December 31, 1956, with the omission of the examiner's decision and some compression of the schedule for briefs, and with the willingness upon the part of the Commission itself to make the effort entailed. That such a schedule did not prejudice petitioner's presentation of its position we show below (*infra*, p. 44).

There was therefore ample warrant in the record for the Commission to conclude on December 6, 1956, as follows: First, that if it should find that the public convenience and necessity required this project it would be its duty and "function" to issue a certificate therefor under Section 7 (c) of the Act.

Second, that "timely" exercise of its function "imperatvely and unavoidably required" action by December 31.

Third, that action by that date was impossible without omission of the intermediate decision procedure.

Fourth, that with the omission of the intermediate decision procedure, it would be possible to discharge its duty in a "due and timely" manner.

Accordingly the Commission was amply warranted in finding as it did (R. 20337–20338) that

> due and timely execution of its functions imperatively and unavoidably requires that the Commission omit the intermediate decision procedure and render final decision in the proceedings.

Cf. *Colorado Interstate Gas Co.* v. *F.P.C.*, 209 F. 2d 717, 721–723 (CA10), reversed on other points, 348 U.S. 492; *Alabama-Tennessee Natural Gas Co.* v. *F.P.C.*, 203 F. 2d 494, 497 (CA3).

Petitioner argues that it is not sufficient reason for omitting the intermediate decision procedure that the execution of the Commission's certificating function imperatively and unavoidably so requires (Pet. Br. 17–21). It seeks to read into the language of the last clause of Section 8 (a) a limitation on the agency functions to which it applies, or the occasions calling for their execution, which would restrict the omission to what it variously calls an "emergency," a "real emergency," a

"genuine emergency," and "the exigency of imperative and unavoidable necessity."

The last phrase points up the defect in petitioner's effort: "necessity" for what? Is that necessity, insofar as the Commission's certificating function is concerned, something more than the concept of "public convenience and necessity" which governs the execution of the function in any event? Petitioner implies some over-riding concept which would separate all agency functions throughout the Government in their great variety, or the occasions calling for their execution, into two classes according to some wholly undefined concept of "necessity." As we read the extracts cited by petitioner from the legislative history of this clause of the Procedure Act, we find no more than a recognition that sometimes an agency simply will not be able to execute a function if it has to follow the intermediate decision procedure. Hence, it was intended that if omission of the procedure is imperatively and unavoidably required for due and timely execution of a function—any function for any purpose—it may be omitted. The words "imperatively and unavoidably" characterize the degree, the stringency of the need for the omission in order that there may be "due and timely execution" of agency functions. As the court said in the *Colorado Interstate* case, *supra*, p. 38 (209 F. 2d at p. 722):

> There are not many decided cases which have dealt with the power of the Commission to dispense with the trial examiner's initial report. In *Kenny* v. *United States*, 103 F. Supp. 971, a three judge court held that under the Interstate Commerce Act, 49 U. S. C. A. § 1, et seq.; the exceptions embodied in Section 1007 (a) (2) were intended to permit the omission of the intermediate report or tentative decision by a trial examiner where the law contemplated speedy and expeditious proceeding by the agency.

That is precisely the present case. Without speedy and expeditious proceeding, the certificating function could not be performed here. Certainly petitioner has no vested interest in any opportunity there might exist to defeat the application through procedural delays, and inasmuch as the omission of

the intermediate decision has not resulted in substantive error, the omission cannot have been prejudicial error.

B. The Commission was authorized to issue a conditioned certificate instead of denying a certificate

Petitioner contends that having found that the applications as made would have to be denied, the Commission should have denied certification and should not have issued certificates upon conditions which applicants were permitted to satisfy without further hearing, citing *McClatchy Broadcasting Co.* v. *F.C.C.*, 99 USAppDC 195, 239 F. 2d 19, certiorari denied 353 U.S. 918, and disputing the Commission's reliance on *C.A.B.* v. *State Airlines*, 338 U.S. 572. But in *McClatchy*, the questioned condition affected the area served by the proposed broadcasting station so as to raise an issue as to the relative coverage of the projects proposed in the competing applications not previously presented, while here there is no change in the proposed project raising any new issue; the Natural Gas Act expressly authorizes the attachment of conditions to a certificate, which was not true of the statute in *McClatchy;* and in the *State Airlines* case the modification, if anything was more likely to raise new issues than those in the present case, as will readily be seen.

Petitioner's objection to the Commission's conditioning of the certificate is variously stated: first, as being that the Commission does not have statutory authority to prescribe "conditions that will make the project eligible for certification" where it is not eligible as originally proposed (Pet. Br. 13); second, as not "whether it has authority to attach conditions to its grant of a certificate * * * [but whether] when, as here, the conditions transform the projects into something wholly different from those applied for and which are the subject of the hearing, a hearing is required as to the new projects [citing the *McClatchy* case]" (Pet. Br. 27–28).

The Commission's power to attach conditions is sufficiently well established to call for no extended argument. It was recently confirmed by the decision of the Third Circuit in *Signal Oil and Gas Co.* v. *F.P.C.* 238 F. 2d 771, certiorari denied, 353 U.S. 923, where, after referring to *Arkansas-Louisiana Gas Co.* v. *F.P.C.* 113 F. 2d 281 (CA5), which upheld the con-

ditioning power even before a specific grant of that power was added to the Act, the Court said (238 F. 2d at pp. 773–774):

> In 1942 section 7 (e) was added to the Act. It provides in part: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convience and necessity may require."
>
> We think this language is pretty clear. Such legislative history as we have tends to show that Congress was advised of the addition to the Commission's express authority and approved thereof. * * * Several cases have recognized this power, * * * and it has never been successfully challenged.
>
> The Commission has assumed it had the power to impose rate conditions on certificates under the provisions of section 7 (e). We are advised that its annual report to Congress for 1955 shows 38 certificate orders subject to rate filing conditions; 1953, 52 such conditions and so on for several prior years. The Commission, of course, cannot enlarge its own statutory authority. But as this Court pointed out in *Panhandle Eastern Pipe Line Co.* v. *FPC,* 232 F. 2d 467, 471 (3d Cir. 1956), "This interpretation of its authority by the Commission through the years must be given considerable weight," especially since left undisturbed by Congress when the Act was amended in 1954.

It is equally clear, we submit, that where, as in this case, the conditions imposed resolve issues which were tried at the hearing no second hearing is necessary. Thus in *C.A.B.* v. *State Airlines,* 338 U.S. 572, the Board certificated Piedmont to operate certain of the routes authorized in a consolidated proceeding on some 45 route applications by 25 companies. Piedmont's routes were not routes which had been specifically detailed in its application. The Supreme Court held, *inter alia,* that there had been sufficient notice and hearing for Piedmont's competitors because "their applications in large part sought certificates in the same general area. Each argued against the other before the Board" (338 U.S. at 579). Moreover, the

issues on which State Airlines contended it was entitled to a second hearing were issues on which it had in fact been heard at the hearing (*ibid*).

The same is true here. Take for example the major conditions that rates for various classes of service be based on costs of the respective services, that capitalization be at not less than 15% equity ratio,[19] that cancellation provisions be eliminated—in all these, and others, the conditions did not raise new issues but resolved the issues previously raised and tried. Some, like the rate issue, may have been resolved adversely to petitioner but that in itself does not mean that a second hearing was required. A second hearing would merely be an opportunity for retrial of the same issues originally tried, with the benefit of a pre-view of the decision.

It was precisely because *McClatchy Broadcasting Company* v. *F.C.C.* 99 USAppDC 195, 239 F. 2d, 19, certiorari denied, 352 U.S. 918, involved a modification in the licensing of a broadcasting station which raised an issue not originally presented that this Court there required rehearing. That case involved competing applications for stations whose antenna locations and heights gave both stations substantially the same area coverage, and hence eliminated all issues between them on that point at the comparative hearing. But after the certificate had been issued it was modified without hearing, to permit a lower antenna at a different location. This would reduce the station's coverage and raise the issue previously not raised and for this reason was regarded as tantamount to the issuance of a new and different permit upon which the other applicant was entitled to a comparative hearing (239 F. 2d at p. 24).

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[19] Petitioners' complaint that no financing plan has even yet been submitted (Pet. Br. 31), graphically illustrates the necessity for Commission use of conditions. For the Commission to take the position that it would withhold certification until final detailed financing plans have been submitted would be to destroy all chance of launching enterprises requiring investments of this size. Investors insist, and rightly, on knowing the legality of the enterprise in which they will invest and commitments depend on facts about the project and market conditions that cannot be known until after a certificate has been issued. The Commission has here resolved the questions of principle about which there was controversy, the remaining details of the financing are now being held up by the pendency of this very litigation and cannot be resolved until it is disposed of.

Here every questioned condition and claimed modification is on an issue that was thoroughly tried, briefed, and argued. Plainly there is no prejudicial error.

C. On application for rehearing the statute authorizes modification of orders without further hearing

Similar to petitioner's contention that the conditioning of the certificates entitled it to a second hearing is its contenion that the Commission's order of February 21, 1956, unlawfully modified the terms of the order accompanying Opinion 301 (Pet. Br. 32–33), citing the *Amarillo-Borger* case in the district court and parallel district court cases (but without mentioning the appeals that followed, dismissal of *Amarillo-Borger*, or the existence of a recent opposing decision).[20]

Aside from the doubtful authority of those cases until the question there involved has been passed upon by a higher court, they are patently inapposite here because there was no statutory authority for the I. C. C.'s orders there complained of (vacating rate suspension orders) without hearing, while in the instant case the Commission was acting under the express authority of Section 19 (a) of the Natural Gas Act:

> Upon such application [for rehearing] the Commission shall have power to grant or deny rehearing or *to abrogate or modify its order without further hearing*. [Emphasis supplied.]

D. Petitioner was not denied fair hearing

Petitioner's remaining procedural objections are that insufficient time was allowed "either for adequate briefing or for deliberate consideration by Respondent of the extensive record" and that petitioner was not allowed to file an answer to the application for rehearing filed by Houston Gas, or to file a second application of its own for rehearing, all with the alleged

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[20] *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (D.C.,N.D. Tex.), dismissed as moot, 352 U.S. 1028; *Dixie Cariers* v. *United States*, 143 F. Supp. 844 (D.C.,S.D.Tex.), probable jurisdiction noted, 353 U.S. 906 (this case is expected to be dismissed as moot also); *Long Island R. Co.* v. *United States*, 140 F. Supp. 823 (D.C.,E.D.N.Y.); but contra, *Coastwise Line* v. *United States*, unreported, (D.C.,N.D.Cal.,S.D.), Civil Action Nos. 36404, 36413, 36444, decided July 15, 1952.

effect of denying petitioner a fair hearing (Pet. Br. 11, 14, 23).

When the hearing closed November 28, 1956, petitioner had until December 20 to submit its brief, with no oral argument set. On December 6, the day after the briefs supporting the applications had become due, the Commission ordered omission of the intermediate decision procedure and advanced the due date of the briefs opposing the applications to December 15 (Pet. Br. 15). Oral argument was later set for December 21, the day after the last briefs were due.

There is no complaint of partiality or bias in the allocation of such time as was available before December 31, 1956, when the gas supply contracts became cancellable—petitioner complains equally of "grossly inadequate time for briefing" and of "time far too short" for Commission examination and consideration of the "20,000 page record." The complaint is directed to the failure to allow more time than could be allowed if decision were reached by that date.

But significantly petitioner does not allege, and the brief it filed offers no internal evidence, that it was in anyway deficient or that it inadequately presented petitioner's position. Petitioner points to no objection which was overlooked and no argument that was slighted because of time limitations. Plainly this cannot be prejudicial error.

And while petitioner repeatedly complains that members of the Commission could not have read the 20,000 page record, it is perfectly obvious that on the noncontroversial questions of gas supply, markets, physical features of the facilities, and superseded proposals, which account for approximately 16,705 out of the 20,000 pages of record [21] there would be little practical need for their being read. In point of fact, our count of the total pages of the record cited in the briefs and oral arguments of all parties shows an aggregate of 2,640 pages of testimony and 134 Exhibits of 3,650 pages to which any of the parties referred.

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[21] This 16,705 is comprised of the following: 2890 pp. of exhibits related to gas supply; 1945 pp., to markets; 379 pp., to physical features of the facilities; or a total of 5214 out of the 6534 pages of exhibits in the record. 830 pp. of testimony related to gas supply; 4656 pp., to markets, and 332 pp., to physical facilities; or a total of 5818 pages out of a total of 8111 pages of testimony in the record. Of the remaining 6258 pages of the record consisting of the applications, other pleadings, orders, etc., 5673 related to gas supply, markets, physical facilities or superseded filings.

Petitioner charges "equivocation" by the Commission in its statement that "this case received consideration as full and careful as it would if dealt with upon a routine basis" because, it says, "absent the searching analysis of the record by the Presiding Examiner, more than consideration on a routine basis is required" (Pet. Br. 7, 11, 16, 46). This charge could result only from a failure to read the Commission's quoted words attentively. The Commission did not say that the consideration of the case was equal to its own consideration routinely given. What it said was "this case received consideration as full and careful as it would if dealt with on a routine basis," i. e., total consideration as full and careful as the total consideration which would be accorded by the examiner and the Commission acting on exceptions to the examiner's report.

But as we have heretofore suggested (*supra*, p. 12), the proof of the adequacy of the Commission's consideration of this case is to be found in the sufficiency of its opinion, findings, and orders. That this test was met is, we submit, demonstrated in our discussion of petitioner's substantive objections (*supra*, pp. 12–33). In fact, the truth is that the Commission manifested better grasp of the facts and the law than petitioner's own brief in this Court, with the better part of a year for its preparation—which should answer petitioner's attempts to impugn and disparage the Commission's discharge of its duties.

Moreover, both petitioner and the Commission were on notice well in advance that a decision probably would have to be rendered before December 31, and had opportunity to take preparatory steps. Thus, for example, petitioner was explicitly put on notice by counsel for Coastal as early as September 28, 1956, of the time limitations governing disposition of the case (R. 5288).

Petitioner's complaint that it was not allowed to answer its opponents' application for rehearing is in reality a complaint against the statute which provides only for applications for rehearing, without responsive pleadings, and which forces the Commission to act or forego action within the limited time of 30 days, making response and replies thereto impractical. Section 19 (b).

And, so far as the Commission's refusal to accept a second application for rehearing is concerned (No. 13952 R. 86–87), the Commission was merely following the decision in *Philadelphia Electric Power Co.* v. *F.P.C.*, 156 F. 2d 648 (CA3), that a second application for rehearing is not contemplated by the review section of the Federal Power Act, which is identical to Section 19 (b)—a procedural point which has not, to our knowledge, been passed on by any other court. In any event, petitioner alleges no aggrievement thereby, and the petition in No. 13952 seeking review of that order should therefore be dismissed. Section 19 (b) of the Natural Gas Act; *The Cincinnati Gas & Electric Co.* v. *F.P.C.* (unreported), CADC No. 13557, decided June 20, 1951; *same* v. *same* (unreported), CADC No. 13515, decided June 3, 1957; *Interstate Electric Inc.* v. *F.P.C.*, 164 F. 2d 485 (CA9). In any event, applications for rehearing are provided for the benefit of the agency, not the parties [22] and refusal to receive either an application for a second rehearing or an answer to an application for rehearing cannot constitute prejudicial error.

In summary, the project would serve the public convenience and necessity only if certificated before December 31, 1956, because the gas supply was not assured after that date. If petitioner could prevent the omission of the intermediate decision procedure it could shield the Florida fuel oil business against competition of natural gas just as effectively as by defeating the applications on the merits. For omission of that step was the only way it would be possible to meet the deadline.

The procedures that were followed afforded petitioner full opportunity to introduce evidence, brief, and orally argue every issue decided by the Commission. Although petitioner complains of the short time, petitioner was not prejudiced by any failure of the brief filed on its behalf adequately to present its case, or of the oral argument.

The certificate conditions and modifications are both expressly authorized by the Act to be made without further hear-

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[22] *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *NLRB* v. *Cheney Lumber Co.*, 327 U.S. 385; *Red River Broadcasting Co.* v. *F.C.C.*, 69 USAppDC, 98 F. 2d 282.

ing. Here they raised no issue upon which petitioner had not already been given opportunity to present evidence, brief, and orally argue, and apply for reconsideration. More is not required. "There must be a limit to individual argument in such matters if Government is to go on." *Bimetallic Investment Co.* v. *Colorado*, 239 U.S. 441, 445.

CONCLUSION

For the foregoing reasons the Commission's orders should be affirmed in No. 13,833 and the petition should be dismissed in No. 13,952.

Respectfully submitted.

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